No. 852

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAR 13 1958
JOHN T. FEY, Clerk

No. 15541

United States
Court of Appeals
for the Ninth Circuit

BANK OF NEVADA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-14-57

FILED

No. 15541

United States Court of Appeals for the Ninth Circuit

BANK OF NEVADA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-14-57

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer to Complaint 6

Certificate of Clerk 46

Complaint 3

Designation of Record (Appellant's—U.S.C.A.) 51

Designation of Record (Appellant's—U.S.D.C.) 45

Judgment 44

Names and Addresses of Attorneys 1

Notice of Appeal 45

Opinion, Findings of Fact and Conclusions of Law 32

Pretrial Order 8

Stipulation Re Designation of Record 48

Stipulation of Facts With Exhibits Attached 9

Statement of Points 49

Supplemental Stipulation 31

NAMES AND ADDRESSES OF ATTORNEYS

MILTON W. KEEFER,
Suite 15-17 Cornet Bldg.,
Fourth and Fremont,
Las Vegas, Nevada,

For the Appellant.

CHARLES K. RICE,
Assistant U. S. Attorney General;

ELLIS N. SLACK,
Attorney, Department of Justice,
Washington 25, D. C.;

FRANKLIN P. RITTENHOUSE,
United States Attorney,
P.O. Box 1589,
Reno, Nevada;

GODFREY MUNTER,
Special Attorney,
Internal Revenue Service,
San Francisco, California,

For the Appellee.

In the United States District Court
for the District of Nevada

No. 135

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BANK OF NEVADA,
Defendant.

COMPLAINT

The United States of America, Plaintiff, by its attorney, Franklin P. R. Rittenhouse, United States Attorney for the District of Nevada, alleges the following:

I.

This action has been authorized by the Commissioner of Internal Revenue of the United States and is brought under the direction of the Attorney General of the United States.

II.

This action arises under the Act of June 25, 1948, c. 646; 62 Stat. 933; U.S.C., Title 28, Sec. 1345, as hereinafter more fully appears.

III.

Defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada. [2*]

---

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

On or about November 15, 1954, withholding and Federal Insurance Contributions Taxes for the calendar year 1954 in the principal amount of $804.50 were assessed against J. D. Bentley, hereinafter referred to as taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of the County Recorder, Clark County, Nevada, on January 12, 1955.

V.

On or about March 1, 1955, Excise Taxes for the calendar year 1954 in the principal amount of $187.51 were assessed against taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of County Recorder, Clark County, Nevada, on June 13, 1955.

VI.

Subsequent to the assessments referred to above, the District Director of Internal Revenue gave notice to and made demand upon taxpayer for payment of such taxes, but taxpayer refuses to pay such taxes.

VII.

On June 10, 1955, the taxpayer had on deposit in an account with the defendant bank the sum of not less than $878.16.

VIII.

On June 10, 1955, a Notice of Levy, for the assessments described above plus statutory additions, in the total amount of $1,069.70 and a Warrant for

Distraint were served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

IX.

On June 14, 1955, a Final Demand for payment of the [3] above-described Notice of Levy was served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

X.

The defendant refuses to surrender the balance due in the taxpayer's bank account as of June 10, 1955, to the District Director of Internal Revenue, thereby rendering itself liable to the United States for such amount under the provisions of Section 6332 of the Internal Revenue Code of 1954 (26 U.S.C., Sec. 6332).

Wherefore, plaintiff prays for judgment against the defendant in the sum of $878.16 together with costs and interest as allowed by law, and for such further relief to which it may be justly entitled.

/s/ **FRANKLIN P. RITTENHOUSE,**
United States Attorney.

[Endorsed]: Filed Sept. 28, 1955. [4]

[Title of District Court and Cause.]

ANSWER

I.

Referring to Paragraphs I and II of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

II.

Defendant admits all of the allegations contained in Paragraph III of Plaintiff's Complaint on file herein.

III.

Referring to Paragraphs IV, V and VI of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

IV.

Defendant admits the allegations contained in Paragraphs VII, VIII, IX and X of Plaintiff's Complaint on file herein.

Affirmative Defense

I.

Defendant on or about June 10, 1955, and prior thereto, was the owner and holder of a demand note dated April 16, 1955, in the principal sum of

$2,000.00, with interest thereon at the rate of six per cent (6%) per annum, upon which there was due and owing a balance in the sum of $1,500.00, together with accrued interest, a copy of which is attached hereto marked Exhibit A and thereby made a part hereof.

II.

Defendant on or about February 28, 1955, and on or about [5] May 31, 1955, entered into written agreements with J. D. Bentley, its depositor and the taxpayer named in Plaintiff's Complaint, forming a part of said depositor's financial statement, which said agreements provided that in the event any deposit account of said depositor or any other property held by Defendant should be attempted to be obtained or held by writ of execution, garnishment, attachment, or other legal process, then all of the obligations of said depositor to the Defendant, at the option of Defendant, would become immediately due and payable without demand or notice. Copies of said agreements are attached hereto marked Exhibits B and C, respectively, and thereby made a part hereof.

III.

Defendant on June 10, 1955, exercised its lien or right of set-off against said depositor, J. D. Bentley, pursuant to the said demand note and said agreements, hereinabove described, and thereby set off or credited against said note the sum of $878.16 which said depositor had on deposit in an account with Defendant.

Wherefore, Defendant prays that Plaintiff take nothing by reason of its Complaint herein and that judgment be entered accordingly for Defendant.

/s/ MILTON W. KEEFER,
Attorney for Defendant Bank of Nevada.

[No exhibits to be printed.]

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 8, 1955. [6]

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled action having come on regularly for pretrial hearing on April 27, 1956, and the parties having appeared by their respective counsel of record; and the court having jurisdiction of both the subject matter and the parties; and the parties having advised the court that a complete agreement had been reached with respect to the material and relevant facts and that this agreement would be presented to the court in the form of a stipulation of facts and attached exhibits; and the parties having filed herewith such a stipulation with exhibits "A" through "H" attached, it is hereby ordered

1. That the stipulation of facts, with Exhibits "A" through "H" attached thereto, presents all

the factual data which the parties consider to be necessary to decision and that no further factual data will be adduced by the parties except upon request by the court. [7]

2. That, in accordance with the understanding reached at the hearing, this controversy involves conflicting claims to the sum of $878.16 which sum was on deposit in the taxpayer-debtor's checking account with the defendant when plaintiff on June 10, 1955, served a levy upon the defendant. Whether defendant is liable to plaintiff for this sum is the only issue here and the decision of that issue depends upon whether defendant's claimed right of set-off is superior to the rights of the plaintiff based on its lien and levy.

3. That the parties, within 60 days from the date of entry of this order, will submit briefs on the issue framed above and that thereafter, upon notification by the court, will present oral arguments in support of their contentions.

Dated Aug. 28, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed Aug. 28, 1956. [8]

[Title of District Court and Cause.]

STIPULATION OF FACTS

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by Sec-

tions 1340 and/or 1345 of Title 28, United States Code. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the taxpayer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance [9] Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "A."

5. On February 28, 1955, and on August 31, 1954, the taxpayer submitted to the Bank of Nevada financial statements, copies of which are attached hereto and marked Exhibits "B" and "B-1," respectively.

6. On March 1, 1955, certain federal excise taxes for the calendar year 1954 in the amount of $187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed two thousand dollars from the Bank of Nevada and executed a promissory note in favor of the bank for that amount. A copy of this note is attached hereto and marked Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, a copy of which is attached hereto and marked Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than $878.16. A copy of the checking account maintained by the taxpayer under the name of Bentley's Trading Post showing the deposit of the loan proceeds on April 16, 1955, and other deposits and withdrawals for the period April 1, 1955, to September 6, 1955, is attached hereto and marked Exhibit "E." On that day (June 10, 1955), the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the as-

sessments [10] referred to above together with statutory additions thereto; a copy of the Notice of Levy is attached hereto and marked Exhibit "F."

10. On that same day, A. M. Smith, Vice-president and Manager of the First and Fremont Branch of the Bank of Nevada, wrote to H. L. Collomb, collection officer, as follows:

> "This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.
>
> "I would like to take this opportunity to inform you that we have exercised our right to set off and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in paragraph seven, which, at the time of the levy, amounted to approximately $1,500.00.

11. On June 13, 1955, a notice of federal tax lien pertaining to the assessment of federal excise taxes was filed in the Office of the County Recorder, Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "G."

12. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Final Demand, Form 668-C, upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First

Fremont Branch of the Bank of Nevada, at 11:10 a.m. A copy of this demand is attached hereto and marked Exhibit "H."

13. This suit was commenced in the United States District Court for the District of Nevada on September 28, 1955.

Date: August 16, 1956.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney, and

HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Plaintiff.

Date: August 28, 1956.

/s/ MILTON W. KEEFER,
Attorney for Defendant. [11]

Note

Pages 14 = 30
are on Card 2

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed by the undersigned counsel of record for the Plaintiff and Defendant, that the following statement is true and should be added to the stipulation of facts filed on August 28, 1956, as paragraph 10a:

> The Bank of Nevada did, on the 10th day of June, 1956, subsequent to 1:45 p.m. of said day, exercise its right of set-off and applied the funds in this account to the taxpayers' unsecured indebtedness referred to in the Stipulation of Facts on file herein.

Date: Oct. 29, 1956.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney, and

HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Plaintiff.

Date: Oct. 2, 1956.

/s/ MILTON W. KEEFER,
Attorney for Defendant.

[Endorsed]: Filed Nov. 7, 1956. [12]

[Title of District Court and Cause.]

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case was submitted upon stipulation of facts together with attached exhibits and supplemental stipulation filed November 7, 1956. The parties are in agreement as to the questions presented for determination; viz.:

1. Whether the defendant was in possession of property of the delinquent taxpayer which was subject to the tax lien sought to be levied against said bank deposits of the taxpayer, and

2. Whether a Federal tax lien on the bank account of a delinquent taxpayer is superior to the claimed right of set-off in the Bank by virtue of the taxpayer's note to the Bank executed after the tax lien arose, or by virtue of an agreement between the Bank and the taxpayer contained in a financial statement executed with the Bank before the tax lien arose.

However, the Bank's contentions are largely based upon its assumption that the taxpayer's note was payable at any time without demand.

In United States v. Graham, et al., 96 F. Supp. 318, 320, affirmed, State of California, et al., v. United States, 9 Cir., 195 F. 2d 530, Judge Harrison held:

"[4-6] The contention that there is no property against which the plaintiff's tax liens may be foreclosed is without support. 'Congress [90] intended to subject all of the taxpayer's property, except that specifically exempt to the payment of taxes. "Property" is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. "Property" within the tax laws should not be given a narrow or technical meaning.' Citizens State Bank of Barstow, Texas, v. Vidal, 10 Cir., 114 F. 2d 380, 382. * * *

"[7] There yet remains the question of whether or not the state may set off against its debt to the taxpayer the taxes owed by the taxpayer to the state. It is unquestioned that under Secs. 3672 and 3710(a), Title 26, U.S.C.A., the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon. U. S. v. Winnett, 9 Cir., 1947, 165 F. 2d 149. If the state had a right of set-off against the taxpayer prior to the United States' asserted lien and priority, the Collector would be bound to recognize the right of the state to set off.

"[8] The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months before the leases with the State of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state accrued with a lien impressed upon it. There was no period of time in which the State of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien. In U. S. v. Winnett, supra, the right of set-off accrued before any tax liens arose."

The sum of $878.16 on deposit with defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of Internal Revenue, property of Bentley, the taxpayer.

The financial statements, Exhibits "B" and "B-1," executed prior to the loan evidence by the note of April 16, 1955, each contained the following:

"The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change [91] in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then, and in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary."

Upon the above-quoted paragraph of the financial statements and the note of April 16, 1955, the Bank bases its claimed right of set-off. The note provided that:

"On Demand; if no demand is made then on August 14th, 1955, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of Nevada * * * Two Thousand and no/100 Dollars. * * *"

"Although the maker of a demand note is not in default until he refuses payment until after demand therefor, it is generally held that a note payable on demand is due immediately, so that suit may be maintained on it at any time after delivery without any other demand than the suit. This rule may not apply, however, where there is something on the paper or in the circumstances under which it was given to show that it was not the intention that it should become due immediately."

> —10 C.J.S. 744, § 247b;
> Sullivan v. Ellis,
> 8 Cir., 219 F. 696, citing 7 Cyc. 848, 849.

From the above-quoted portion of the note it appears that it was not the intention of the payee or the maker of the note that the same was to be due immediately upon delivery. It was the evident intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the Bank for payment was [92] made.

Defendant Bank, in its brief, states:

"* * * the bank had a right of set-off and thereby a lien upon any funds of the taxpayer on deposit with it, which arose prior in time to the date of November 15, 1954, which was the date upon which the tax lien arose. This lien of the bank was created by virtue of the financial statement dated August 31, 1954 (Exhibit B-1), wherein the bank was given the right by the depositor to apply any and all funds against any and all indebtedness of the taxpayer-depositor without demand and without notice to the taxpayer-depositor when and as certain conditions existed or came into being which jeopardized the claim of the bank under its promissory demand note, and which materially changed the taxpayer's-depositor's financial condition."

On June 10, 1955, the taxpayer had on deposit with defendant Bank in a checking account the sum of $878.16. On November 15, 1954, Withholding and Federal Insurance Contribution Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against the taxpayer. On March 1, 1955, Federal Excise taxes for the calendar year 1954, in the amount of $187.51, were assessed against the taxpayer.

On June 10, 1955, the District Director of Internal Revenue caused to be served upon the Bank a Notice of Levy covering both of the assessments. As has been noted, at the time of the service of the levy, no part of the obligation secured by the note was due and no contention is made that at that time the taxpayer was insolvent.

Therefore, the principles stated in the following quotation can have no application here:

"The propriety of allowing the offset is at once apparent, and, in view of the fact that the lessor had become insolvent, it is immaterial that under the terms of the least the return of the deposit was not yet due. In City Investment Company v. Pringle, 73 Cal. App. 782, 239, P. 302, the court reviewed the authorities relating to set-offs against insolvent debtors, and there said at page 791 of 73 Cal. App., 239, P. 302, 306, '* * * insolvency itself is a sufficient ground for the application of equitable set-off, and the fact, that the indebtedness on one side is not due when set-off is claimed, constitutes no obstacle to the assertion of the right as against an insolvent, debtor.' "

—Gordon v. Foote,
Cal. App., 7 P. 2d 709, 710. [93]

On the same day, June 10, 1955, after service of the levy, the Bank attempted to exercise its claimed right of set-off of the balance remaining unpaid on the note against the $878.16 on deposit to the credit of the taxpayer. From Exhibit "E" it appears that for the period beginning April 1, 1955, to September 6, 1955, the Bank accepted taxpayer's deposits and honored his withdrawals. The exhibit indicates substantial withdrawals by depositor for several months after the claimed right of set-off.

The Federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank, if such right existed.

The Court's attention has been called to § 8737, Nev. Comp. Laws, 1929, which is as follows:

"Every garnishee shall be allowed to retain or deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, * * *."

That this state law cannot give superiority to the Bank's claimed right of setoff over the pre-existing liens is made apparent by Mr. Chief Justice Stone in Michigan v. United States, 317 U.S. 338, 340, where he stated:

"We do not stop to inquire whether this construction of the state statutes is the correct one, for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes.' Article I, § 8 of the Constitution. United States v. Snyder, 149 U. S. 210. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be 'the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.'

" 'It is of the very nature and essence of a lien, that no matter into whose hands the property [94] goes, it passes cum onere.' * * * Hence, it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. United States v. Snyder, supra; United States v. Greenville, 118 F. 2d 963."

Even if any rights the Bank might have had under the Nevada statute had the dignity of a lien, no right under that statute could displace the prior tax liens existing here.

On June 10, 1955, and prior thereto, the amount on deposit to the credit of Bentley was burdened with the prior existing Federal tax liens. On that date Bentley was solvent and the note of April 16, 1955, had not matured and would not become payable prior to August 14, 1955, in the absence of a demand. In the face of these facts, the Bank had no right to setoff and apply the funds in Bentley's account on the promissory note.

Upon the stipulation of the parties, the Court finds:

Findings of Fact

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by §§ 1340 and/or 1345 of Title 28, U.S.C.A. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the [95] tax-

payer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "A."

5. On February 28, 1955, and on August 31, 1954, the taxpayer submitted to the Bank of Nevada financial statements, Exhibits "B" and "B-1," respectively.

6. On March 1, 1955, certain Federal Excise taxes for the calendar year 1954 in the amount of $187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed $2,000 from the Bank of Nevada and executed a promissory note in favor of the Bank for that amount, Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than $878.16, Exhibit "E." On that day,

June 10, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the assessments, referred to in Findings Nos. 3 and 6, together with statutory additions thereto, Exhibit "F."

10. On that same day, A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, [96] wrote to H. L. Collomb, Collection Officer, as follows:

"This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

"I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in Finding No. 7, which, at the time of the levy, amounted to approximately $1,500.

11. The Bank of Nevada did, on the 10th day of June, 1955, subsequent to 1:45 p.m. of said day, exercise its "claimed" right of setoff and applied the funds in this account to the taxpayer's unsecured indebtedness.

12. On June 13, 1955, a notice of Federal tax lien pertaining to the assessment of Federal Excise taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "G."

13. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Final Demand, Form 668-C, upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, at 11:10 a.m., Exhibit "H."

Conclusions of Law

The Court concludes:

1. That plaintiff's tax liens are paramount and valid liens and that plaintiff is entitled to judgment in the amount of $878.16 plus legal interest and costs as provided by § 6332, Internal Revenue Code, 1954, 26 U.S.C.A., § 6332.

The plaintiff, United States of America, shall submit [97] a form of judgment to the Court for approval.

Dated: This 14th day of March, 1957.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed March 14, 1957. [98]

In the United States District Court
for the District of Nevada

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BANK OF NEVADA,
Defendant.

JUDGMENT

This matter having been submitted to the Court upon a stipulation of facts together with attached exhibits and a supplemental stipulation; and the arguments of counsel having been heard; and the Court having made its findings of fact and conclusions of law, now makes its judgment.

It Is Hereby Ordered, Adjudged, and Decreed, that the Bank of Nevada, defendant herein, pay to the plaintiff herein, United States of America, the sum of $878.16, together with interest thereon at the rate of 6 per centum per annum from June 10, 1955, to the date of entry of this judgment and plaintiff's costs incurred herein.

Dated this 29th day of March, 1957.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed March 29, 1957. [99]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bank of Nevada, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of March, 1957.

/s/ MILTON W. KEEFER,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1957. [100]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.
2. Defendant's Answer to Complaint on file herein.
3. Pretrial Order, dated August 28, 1956.
4. Stipulation of Facts, entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956.
5. Exhibit A, Exhibit B, Exhibit B1, Exhibit C,

Exhibit D, Exhibit E, Exhibit F, Exhibit G and Exhibit H.

6. Brief for the Plaintiff. [103]
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 17, 1957.
11. Opinion, Findings of Fact and Conclusions of Law, filed March 14, 1957.
12. Judgment, entered March 29, 1957.
13. Notice of Appeal, filed April 5, 1957.
14. This Designation of Record on Appeal.

Dated this 12th day of April, 1957.

/s/ MILTON W. KEEFER,
Attorney for Appellant, Bank of Nevada.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1957. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the originals filed in this Court, or true and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant, and that they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of April, 1957.

[Seal] OLIVER F. PRATT,
Clerk;

By /s/ RAY MONA SMITH,
Deputy Clerk. [105]

[Endorsed]: No. 15541. United States Court of Appeals for the Ninth Circuit. Bank of Nevada, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 26, 1957.

Docketed: May 2, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15541

BANK OF NEVADA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STIPULATION

It is hereby stipulated and agreed by and between the Appellant, Bank of Nevada, and the Appellee, United States of America, that there be deleted from the Record on Appeal in the above-entitled action the following, which were designated in the Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court:

6. Brief for the Plaintiff.
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 17, 1957.

Dated: May 1, 1957.

FRANKLIN RITTENHOUSE,
United States Attorney, and

HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Appellee.

/s/ MILTON W. KEEFER,
Attorney for Appellant.

[Endorsed]: Filed May 4, 1957.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Points upon which Appellant intends to rely on in this Appeal are as follows:

1. That the Court erred in finding the Plaintiff's tax liens were paramount and valid liens.

2. The Court erred in finding the sum on deposit with the Defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of the Internal Revenue Bureau, property of Bentley, the taxpayer.

3. The Court erred in finding that it was the intention of the parties that the Note was to become due August 14, 1955, unless in the meantime a final demand by the Bank for payment was made.

4. The Court erred in finding that at the time of the service of the Levy, no part of the obligation secured by the Note was due.

5. The Court erred in finding that on June 10, 1955, and prior thereto, the amount on deposit to the credit of taxpayer,

6. The Court erred in finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank.

7. The Court erred in not finding that the Bank had a right of setoff and applying the funds in Bentley's, the taxpayer's, account on the Promissory Demand Note then due and owing to the Bank.

8. The judgment entered pursuant thereto is contrary to law.

9. The judgment entered pursuant thereto is contrary to the evidence.

MILTON W. KEEFER, and
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.

2. Defendant's Answer to Complaint on file herein.

3. Pretrial Order, dated August 28, 1956.

4. Stipulation of Facts entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956, together with all Exhibits attached thereto marked Exhibits "A" through "H," inclusive.

5. Opinion, Findings of Fact and Conclusions of Law, filed March 14, 1957.

6. Judgment, entered March 29, 1957.

7. Notice of Appeal, filed April 5, 1957.

8. Stipulation eliminating Briefs and Citations for Plaintiff and Defendant and transcript of oral argument of counsel from the Record on Appeal.

9. The Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court for the District of Nevada.

10. The Appellant's statement of points upon which he intends to rely.

11. This Designation of Record on Appeal.

Dated this 3rd day of May, 1957.

MILTON W. KEEFER, and
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,
Attorneys for Defendant-Appellant, Bank of Nevada.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.

14

(14)

668
REV. JAN. [illegible]

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS

DISTRICT: Reno

NO. 1277

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

NAME OF TAXPAYER: J. D. Bentley

RESIDENCE OR PLACE OF BUSINESS: 205 Fremont Street, Las Vegas, Nevada.

NATURE OF TAX	ACCOUNT NO.	YEAR OR TAXABLE PERIOD	ASSESSMENT DATE	AMOUNT OF ASSESSMENT
WT-FICA	11-54 514-5	3Q54	11-15-54	$ 804.50
			TOTAL	$ 804.50

WITNESS my hand at Reno, Nevada, on this,

the 3rd day of January, 1955

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY (Signature)	TITLE
(sgd) V. W. EVANS		

NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien. G.C.M. 26419, C.B. 1950-1, 125.)

U. S. GOVERNMENT PRINTING OFFICE 1954 O - [illegible]

Exhibit "A"

11A

1

(15)

FINANCIAL STATEMENT
INDIVIDUAL OR PARTNERSHIP

FINANCIAL STATEMENT OF
NAME Bentley's Trading Post
ADDRESS 305 Fremont St.
To BANK OF NEVADA
LAS VEGAS NEVADA

Received at First & Fremont Branch
BUSINESS Jewelry & Novelties
AT CLOSE OF BUSINESS February 28th, 1955

THE UNDERSIGNED, FOR THE PURPOSE OF PROCURING AND ESTABLISHING CREDIT FROM TIME TO TIME WITH YOU AND TO INDUCE YOU TO PERMIT THE UNDERSIGNED TO BECOME INDEBTED TO YOU ON NOTES, ENDORSEMENTS, GUARANTEES, OVERDRAFTS OR OTHERWISE, FURNISHES THE FOLLOWING AS BEING A TRUE AND CORRECT STATEMENT OF THE FINANCIAL CONDITION OF THE UNDERSIGNED ON THE ABOVE DATE, AND AGREES TO NOTIFY YOU IMMEDIATELY OF THE EXTENT AND CHARACTER OF ANY MATERIAL CHANGE IN SAID FINANCIAL CONDITION, AND ALSO AGREES THAT IF THE UNDERSIGNED, OR ANY ENDORSER OR GUARANTOR OF ANY OF THE OBLIGATIONS OF THE UNDERSIGNED, AT ANY TIME FAILS IN BUSINESS OR BECOMES INSOLVENT, OR COMMITS AN ACT OF BANKRUPTCY, OR IF ANY DEPOSIT ACCOUNT OF THE UNDERSIGNED WITH YOU, OR ANY OTHER PROPERTY OF THE UNDERSIGNED HELD BY YOU, BE ATTEMPTED TO BE OBTAINED OR HELD BY WRIT OF EXECUTION, GARNISHMENT, ATTACHMENT OR OTHER LEGAL PROCESS, OR IF ANY OF THE REPRESENTATIONS MADE BELOW PROVE TO BE UNTRUE, OR IF THE UNDERSIGNED FAILS TO NOTIFY YOU OF ANY MATERIAL CHANGE AS ABOVE AGREED, THEN AND IN SUCH CASE, AT YOUR OPTION, ALL OF THE OBLIGATIONS OF THE UNDERSIGNED TO YOU, OR HELD BY YOU, SHALL IMMEDIATELY BECOME DUE AND PAYABLE, WITHOUT DEMAND OR NOTICE. THIS STATEMENT SHALL BE CONSTRUED BY YOU TO BE A CONTINUING STATEMENT OF THE CONDITION OF THE UNDERSIGNED, AND A NEW AND ORIGINAL STATEMENT OF ALL ASSETS AND LIABILITIES UPON EACH AND EVERY TRANSACTION IN AND BY WHICH THE UNDERSIGNED HEREAFTER BECOMES INDEBTED TO YOU, UNTIL THE UNDERSIGNED ADVISES IN WRITING TO THE CONTRARY.

ASSETS	DOLLARS	CENTS
CASH IN Bank of Nevada	(1 [illegible]	[illegible])
CASH ON HAND [illegible]	[illegible]	[illegible]
NOTES RECEIVABLE AND TRADE ACCEPTANCES (NOT PLEDGED)* LESS RESERVES	[illegible]	[illegible]
ACCOUNTS RECEIVABLE Advanced on [illegible] * LESS RESERVES	[illegible]	[illegible]
(*DO NOT INCLUDE AMOUNTS DUE FROM PARTNERS, EMPLOYES OR RELATIVES SEE * BELOW)		
MERCHANDISE FINISHED HOW VALUED	22 137	[illegible]
MERCHANDISE UNFINISHED HOW VALUED		
MERCHANDISE RAW MATERIAL HOW VALUED		
STOCKS AND BONDS LISTED AS PER SCHEDULE ON REVERSE		
STOCKS AND BONDS PLEDGED WITH BROKERS		
Lease Valuation	6 [illegible]	00
TOTAL CURRENT	61 752	73
STOCKS AND BONDS UNLISTED AS PER SCHEDULE ON REVERSE		
REAL ESTATE AS PER SCHEDULE ON REVERSE	[illegible]	[illegible]
MACHINERY $ FIXTURES $ X	17 [illegible]	[illegible]
AUTOMOBILES	7 [illegible]	[illegible]
*NOTES AND ACCOUNTS DUE FROM PARTNERS, RELATIVES, EMPLOYES		
CASH VALUE LIFE INSURANCE		
OTHER ASSETS DESCRIBE		
TOTAL	277 982	[illegible]

LIABILITIES	DOLLARS	CENTS
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE SECURED		
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE UNSECURED	2 [illegible]	[illegible]
NOTES PAYABLE TO BANKS SECURED	3 [illegible]	[illegible]
NOTES PAYABLE TO BANKS UNSECURED	7 [illegible]	[illegible]
NOTES PAYABLE TO OTHERS SECURED		
NOTES PAYABLE TO OTHERS UNSECURED		
ACCOUNTS PAYABLE NOT DUE / ACCOUNTS PAYABLE PAST DUE	[illegible] 002	04
AMOUNTS OWING TO BROKERS		
CHATTEL MORTGAGES		
CONTRACTS OF SALE (OTHER THAN REAL ESTATE)		
ACCRUED TAXES & INTEREST	2 607	93
DEPOSITS OF MONEY WITH US BY RELATIVES OR EMPLOYES		
TOTAL CURRENT	[illegible] 041	56
MORTGAGES OR LIENS ON REAL ESTATE SEE SCHEDULE REVERSE	[illegible]	[illegible]
RESERVE FOR DEPRECIATION	11 [illegible]	[illegible]
Deposit on Inventory	26 800	00
Loan Due Mrs. Bentley	17 250	00
NET WORTH	95 [illegible]	34
TOTAL	277 982	36

PROFIT AND LOSS STATEMENT FROM TO

	DOLLARS	CENTS
NET SALES (AFTER RET. SALES AND ALLOWANCES)	[illegible]	[illegible]
LESS COST OF SALES	6 [illegible]	[illegible]
GROSS PROFIT ON SALES	12 [illegible]	[illegible]
LESS EXPENSES SALARIES AND WAGES	4 [illegible]	87
INTEREST	[illegible]	70
TAXES	[illegible]	[illegible]
RENT	[illegible]	[illegible]
BAD DEBTS		
DEPRECIATION		
OTHER EXPENSES	[illegible]	[illegible]
TOTAL EXPENSES	5 [illegible]	[illegible]
NET PROFIT FROM OPERATIONS	6 [illegible]	[illegible]
ADD OTHER INCOME, INVESTMENTS, ETC		
NET PROFIT		

RECONCILIATION OF NET WORTH

NET WORTH—LAST STATEMENT SUBMITTED	
ADD NET PROFIT	
OTHER ADDITIONS (EXPLAIN)	
TOTAL	
LESS WITHDRAWALS	
OTHER DEDUCTIONS (EXPLAIN)	
TOTAL DEDUCTIONS	
NET WORTH ON THIS FINANCIAL STATEMENT	

GIVE TIME OF YEAR WHEN ITEMS BELOW ARE	AT MAXIMUM	AT MINIMUM
NOTES AND ACCOUNTS RECEIVABLE		
STOCK OF MERCHANDISE		
LIABILITIES		
AVERAGE TERMS OF PURCHASE	SALE	
BANK ACCOUNTS WHERE KEPT OTHER THAN ABOVE		

CONTINGENT LIABILITY

AS GUARANTOR	
ACCOMMODATION ENDORSEMENTS	
ACCOUNTS, NOTES OR TRADE ACCEPTANCES DISCOUNTED OR PLEDGED	
SURETY ON BONDS OR OTHER CONTINGENT LIABILITY	
LETTERS OF CREDIT	

Exhibit "B"

11B

(16)

EX. 9

INSURANCE

ON MERCHANDISE $

ON MACHINERY $

ON BUILDINGS $

AUTOMOBILES AND TRUCKS: PUBLIC LIABILITY $ / COLLISION $ / PROPERTY DAMAGE $

IS FALLEN BUILDING CLAUSE WAIVED IN POLICIES?

DO YOU CARRY EARTHQUAKE INSURANCE? HOW MUCH? $

LIFE INSURANCE? HOW MUCH? $

NAME OF BENEFICIARY

NAME OF COMPANY

DO YOU CARRY WORKMEN'S COMPENSATION INSURANCE?

ARE YOU BORROWING FROM ANY OTHER BRANCH OF THIS BANK?

HAVE YOU APPLIED FOR CREDIT AT ANY OTHER SOURCE?

LEASE HAS YEARS TO RUN. MONTHLY RENTAL $

BUY PRINCIPALLY FROM

BOOKS: ARE YOUR BOOKS AUDITED BY OUTSIDE ACCOUNTANTS?

IF SO GIVE NAME OF ACCOUNTANTS

TO WHAT DATE HAS INTERNAL REVENUE DEPT. EXAMINED YOUR BOOKS CONCERNING FEDERAL TAXES?

BASIS OF STATEMENT: IF ACTUAL INVENTORY BY WHOM TAKEN AND DATE?

IF ESTIMATED BY WHOM MADE AND DATE

JUDGMENTS AGAINST US UNSATISFIED OR SUITS PENDING AGAINST US

COMMITMENTS ON UNFINISHED CONTRACTS OR PURCHASE OF GOODS $

SPECIFY ANY OF THE ASSETS OR LIABILITIES ORIGINATING FOR MERCHANDISE HELD ON CONSIGNMENT AND WHICH ARE SUBJECT TO AGENCY AGREEMENT

EARL K Phillips

QUESTIONS, IF INDIVIDUAL.

1. WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS IN JOINT TENANCY?
2. WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS COMMUNITY PROPERTY?
3. ARE YOU A PARTNER IN ANY OTHER BUSINESS?
4. DO YOU DEAL OR CARRY ACCOUNTS WITH STOCKBROKERS?

NAME OF OTHER PARTY

IF [illegible] FIRM

QUESTIONS IF PARTNERSHIP

NAMES OF PARTNERS	AMOUNT CONTRIBUTED	OUTSIDE NET WORTH APART FROM THIS FIRM	OTHER BUSINESS CONNECTIONS OF EACH PARTNER
			Earl K Phillips 9-4-56

DATE OF ORGANIZATION OF PARTNERSHIP

LIFE OF PARTNERSHIP

NOTE: IF OPERATING UNDER FICTITIOUS STYLE EITHER AS AN INDIVIDUAL OR AS A PARTNERSHIP GIVE DATE OF FILING OF SAID STYLE

LIST OF REAL ESTATE AND IMPROVEMENTS WITH ENCUMBRANCES THEREON

DESCRIPTION STREET NUMBER LOCATION	TITLE TO PROPERTY IN NAME OF	ASSESSED VALUATION	VALUATION: LAND	VALUATION: IMPROVEMENTS	MORTGAGES OR LIENS: DUE DATE	MORTGAGES OR LIENS: AMOUNT	HOLDER OF LIEN
[illegible] House		$	$	$ [illegible]		$ 8994.88	
[illegible] House				[illegible]		37,353.50	
Home Furniture				4,974.41			
California Real Estate				98,873.79		36,544.98	
				191,728.83		82,893.36	

STOCKS AND BONDS: DESCRIBE FULLY. USE SUPPLEMENTAL SHEET IF NECESSARY. INDICATE IF STOCKS ARE COMMON OR PREFERRED. GIVE INTEREST RATE AND MATURITY OF BONDS.

NUMBER	NAME AND ISSUE	LISTED	UNLISTED	NUMBER	NAME AND ISSUE	LISTED	UNLISTED
		$	$			$	$

STATEMENT OF BANK OFFICER

INSOFAR AS OUR RECORDS REVEAL, THIS FINANCIAL STATEMENT IS ACCURATE AND TRUE. THE FOREGOING STATEMENT IS (A COPY OF) THE ORIGINAL, SIGNED BY THE MAKER IN THE CREDIT FILES OF THIS BANK.

THE AVERAGE DAILY BALANCE FOR THE PAST YEAR HAS BEEN

COML. A/C $ SAV. A/C $

BANK OF NEVADA
LAS VEGAS, NEVADA

CASHIER

VICE PRES. MANAGER

I SOLEMNLY DECLARE AND CERTIFY THAT THE ABOVE STATEMENT AND SCHEDULES ON THIS AND THE OPPOSITE SIDE GIVE A TRUE AND COMPLETE ACCOUNT OF THE CONDITION OF OUR (MY) BUSINESS ON THE DAY ABOVE STATED.

SIGNATURE /s/ John D. Bentley

NOTE: IF YOU HAVE EVER FAILED IN BUSINESS ATTACH A COPY OF [illegible] AND STATE BASIS OF SETTLEMENT WITH CREDITORS

17

(17)

IN NCIAL STATEMENT
IN IDUAL OR PARTNERSHIP

FINANCIAL STATEMENT OF

NAME John D Bradley

ADDRESS 204 Fremont St

BUSINESS Jewelry and novelties

Received at ...... Branch

AT CLOSE OF BUSINESS 8-31 — 54

To BANK OF NEVADA
LAS VEGAS, NEVADA

Copy sent M.O.

THE UNDERSIGNED, FOR THE PURPOSE OF PROCURING AND ESTABLISHING CREDIT FROM TIME TO TIME WITH YOU AND TO INDUCE YOU TO PERMIT THE UNDERSIGNED TO BECOME INDEBTED TO YOU ON NOTES, ENDORSEMENTS, GUARANTEES, OVERDRAFTS OR OTHERWISE, FURNISHES THE FOLLOWING AS BEING A TRUE AND CORRECT STATEMENT OF THE FINANCIAL CONDITION OF THE UNDERSIGNED ON THE ABOVE DATE, AND AGREES TO NOTIFY YOU IMMEDIATELY OF THE EXTENT AND CHARACTER OF ANY MATERIAL CHANGE IN SAID FINANCIAL CONDITION, AND ALSO AGREES THAT IF THE UNDERSIGNED, OR ANY ENDORSER OR GUARANTOR OF ANY OF THE OBLIGATIONS OF THE UNDERSIGNED, AT ANY TIME FAILS IN BUSINESS OR BECOMES INSOLVENT, OR COMMITS AN ACT OF BANKRUPTCY, OR IF ANY DEPOSIT ACCOUNT OF THE UNDERSIGNED WITH YOU, OR ANY OTHER PROPERTY OF THE UNDERSIGNED HELD BY YOU, BE ATTEMPTED TO BE OBTAINED OR HELD BY WRIT OF EXECUTION, GARNISHMENT, ATTACHMENT OR OTHER LEGAL PROCESS, OR IF ANY OF THE REPRESENTATIONS MADE BELOW PROVE TO BE UNTRUE, OR IF THE UNDERSIGNED FAILS TO NOTIFY YOU OF ANY MATERIAL CHANGE AS ABOVE AGREED, THEN AND IN SUCH CASE, AT YOUR OPTION, ALL OF THE OBLIGATIONS OF THE UNDERSIGNED TO YOU, OR HELD BY YOU, SHALL IMMEDIATELY BECOME DUE AND PAYABLE, WITHOUT DEMAND OR NOTICE. THIS STATEMENT SHALL BE CONSTRUED BY YOU TO BE A CONTINUING STATEMENT OF THE CONDITION OF THE UNDERSIGNED, AND A NEW AND ORIGINAL STATEMENT OF ALL ASSETS AND LIABILITIES UPON EACH AND EVERY TRANSACTION IN AND BY WHICH THE UNDERSIGNED HEREAFTER BECOMES INDEBTED TO YOU, UNTIL THE UNDERSIGNED ADVISES IN WRITING TO THE CONTRARY.

ASSETS	DOLLARS	CENTS
CASH IN (NAME OF BANK)	(4498	56)
CASH ON HAND	303	90
NOTES RECEIVABLE AND TRADE ACCEPTANCES (NOT PLEDGED)* LESS RESERVES	74 000	00
ACCOUNTS RECEIVABLE OF CUSTOMERS (NOT PLEDGED)* LESS RESERVES (*DO NOT INCLUDE AMOUNTS DUE FROM PARTNERS, EMPLOYES OR RELATIVES. SEE * BELOW).		
MERCHANDISE FINISHED HOW VALUED Cost	36 317	84
MERCHANDISE UNFINISHED HOW VALUED		
MERCHANDISE RAW MATERIAL HOW VALUED		
STOCKS AND BONDS LISTED (AS PER SCHEDULE ON REVERSE)		
STOCKS AND BONDS PLEDGED WITH BROKERS		
Interest accrued	3 400	00
TOTAL CURRENT	113 560	48
STOCKS AND BONDS UNLISTED (AS PER SCHEDULE ON REVERSE)		
REAL ESTATE (AS PER SCHEDULE ON REVERSE)	103 444	84
MACHINERY $ FIXTURES $	17 194	76
AUTOMOBILES	7 493	91
*NOTES AND ACCOUNTS DUE FROM PARTNERS, RELATIVES, EMPLOYES		
CASH VALUE LIFE INSURANCE Loan Value	6 300	00
OTHER ASSETS (DESCRIBE)		
TOTAL	297 934	19

LIABILITIES	DOLLARS	CENTS
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE SECURED	—	
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE UNSECURED		
NOTES PAYABLE TO BANKS SECURED	2 000	00
NOTES PAYABLE TO BANKS UNSECURED	1 000	00
NOTES PAYABLE TO OTHERS SECURED		
NOTES PAYABLE TO OTHERS Mrs Bradley UNSECURED	12 500	00
ACCOUNTS PAYABLE NOT DUE	3 218	85
ACCOUNTS PAYABLE PAST DUE	9 844	73
AMOUNTS OWING TO BROKERS		
CHATTEL MORTGAGES		
CONTRACTS OF SALE (OTHER THAN REAL ESTATE)		
ACCRUED TAXES & INTEREST	1 548	78
DEPOSITS OF MONEY WITH US BY RELATIVES OR EMPLOYES		
TOTAL CURRENT	38 352	36
MORTGAGES OR LIENS ON REAL ESTATE (SEE SCHEDULE REVERSE)	89 000	00
RESERVE FOR DEPRECIATION	10 228	10
NET WORTH	159 899	32
TOTAL	297 934	19

PROFIT AND LOSS STATEMENT FROM TO

	DOLLARS	CENTS
NET SALES (AFTER RET. SALES AND ALLOWANCES)	55 794	48
LESS COST OF SALES	27 899	74
GROSS PROFIT ON SALES	27 894	74
LESS EXPENSES SALARIES AND WAGES	11 [illegible]	63
INTEREST	98	64
TAXES	383	26
RENT	2 470	00
BAD DEBTS		
DEPRECIATION		
OTHER EXPENSES	4 373	47
TOTAL EXPENSES	19 867	10
NET PROFIT FROM OPERATIONS	8 032	64
ADD OTHER INCOME INVESTMENTS ETC.	530	40
NET PROFIT	8 563	04

RECONCILIATION OF NET WORTH

NET WORTH—LAST STATEMENT SUBMITTED		
ADD: NET PROFIT		
OTHER ADDITIONS (EXPLAIN)		
TOTAL		
LESS WITHDRAWALS		
OTHER DEDUCTIONS (EXPLAIN)		
TOTAL DEDUCTIONS		
NET WORTH ON THIS FINANCIAL STATEMENT		

GIVE TIME OF YEAR WHEN ITEMS BELOW ARE	AT MAXIMUM	AT MINIMUM
NOTES AND ACCOUNTS RECEIVABLE		
STOCK OF MERCHANDISE		
LIABILITIES		

AVERAGE TERMS OF PURCHASE ...... SALE

BANK ACCOUNTS, WHERE KEPT OTHER THAN ABOVE

CONTINGENT LIABILITY

AS GUARANTOR		
ACCOMMODATION ENDORSEMENTS		
ACCOUNTS, NOTES OR TRADE ACCEPTANCES DISCOUNTED OR PLEDGED		
SURETY ON BONDS OR OTHER CONTINGENT LIABILITY		
LETTERS OF CREDIT		

(FILL BLANKS ON OTHER SIDE)

CR-1 2-48

18

(18)

INSURANCE

ON MERCHANDISE $
ON MACHINERY $
ON BUILDINGS $

AUTOMOBILES AND TRUCKS: PUBLIC LIABILITY $ / COLLISION $ / PROPERTY DAMAGE $

IS FALLEN BUILDING CLAUSE WAIVED IN POLICIES?
DO YOU CARRY EARTHQUAKE INSURANCE? HOW MUCH? $
LIFE INSURANCE? HOW MUCH? $
NAME OF BENEFICIARY
NAME OF COMPANY
DO YOU CARRY WORKMEN'S COMPENSATION INSURANCE?

ARE YOU BORROWING FROM ANY OTHER BRANCH OF THIS BANK?
HAVE YOU APPLIED FOR CREDIT AT ANY OTHER SOURCE?
LEASE HAS YEARS TO RUN MONTHLY RENTAL $
BUY PRINCIPALLY FROM

BOOKS ARE YOUR BOOKS AUDITED BY OUTSIDE ACCOUNTANTS?
IF SO GIVE NAME OF ACCOUNTANTS
TO WHAT DATE HAS INTERNAL REVENUE DEPT. EXAMINED YOUR BOOKS CONCERNING FEDERAL TAXES?
BASIS OF STATEMENT IF ACTUAL INVENTORY BY WHOM TAKEN AND DATE?
IF ESTIMATED BY WHOM MADE AND DATE
JUDGMENTS AGAINST US, UNSATISFIED, OR SUITS PENDING AGAINST US
COMMITMENTS ON UNFINISHED CONTRACTS OR PURCHASE OF GOODS $
SPECIFY ANY OF THE ASSETS OR LIABILITIES ORIGINATING FOR MERCHANDISE HELD ON CONSIGNMENT AND WHICH ARE SUBJECT TO AGENCY AGREEMENT.

QUESTIONS, IF INDIVIDUAL.

1. WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS IN JOINT TENANCY? NAME OF OTHER PARTY Doris Bentley.
2. WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS COMMUNITY PROPERTY? NAME OF OTHER PARTY —
3. ARE YOU A PARTNER IN ANY OTHER BUSINESS? No
4. DO YOU DEAL OR CARRY ACCOUNTS WITH STOCKBROKERS? No IF SO GIVE NAME OF FIRM

QUESTIONS IF PARTNERSHIP

NAMES OF PARTNERS	AMOUNT CONTRIBUTED	OUTSIDE NET WORTH APART FROM THIS FIRM	OTHER BUSINESS CONNECTIONS IF ANY, OF EACH PARTNER

DATE OF ORGANIZATION OF PARTNERSHIP LIFE OF PARTNERSHIP
NOTE: IF OPERATING UNDER FICTITIOUS STYLE EITHER AS AN INDIVIDUAL OR AS A PARTNERSHIP, GIVE DATE OF FILING OF SAID STYLE.

LIST OF REAL ESTATE AND IMPROVEMENTS WITH ENCUMBRANCES THEREON

DESCRIPTION, STREET NUMBER, LOCATION	TITLE TO PROPERTY IN NAME OF	ASSESSED VALUATION	VALUATION		MORTGAGES OR LIENS		HOLDER OF LIEN
			LAND	IMPROVEMENTS	DUE DATE	AMOUNT	
California Real Estate		$	$	70.000.00	Installments	36000	
				43425.00	✓	14000	
				90000.00	✓	40000	
				203425.00		90000.00	

STOCKS AND BONDS: DESCRIBE FULLY. USE SUPPLEMENTAL SHEET IF NECESSARY. INDICATE IF STOCKS ARE COMMON OR PREFERRED, GIVE INTEREST RATE AND MATURITY OF BONDS.

NUMBER	NAME AND ISSUE	LISTED	UNLISTED	NUMBER	NAME AND ISSUE	LISTED	UNLISTED
		$	$			$	$

STATEMENT OF BANK OFFICER:
INSOFAR AS OUR RECORDS REVEAL, THIS FINANCIAL STATEMENT IS ACCURATE AND TRUE. THE FOREGOING STATEMENT IS (A COPY OF) (THE ORIGINAL) SIGNED BY THE MAKER, IN THE CREDIT FILES OF THIS BANK
THE AVERAGE DAILY BALANCE FOR THE PAST YEAR HAS BEEN:
COML. A/C $ SAV. A/C $

BANK OF NEVADA
LAS VEGAS, NEVADA
VICE-PRESIDENT MANAGER CASHIER

I SOLEMNLY DECLARE AND CERTIFY THAT THE ABOVE STATEMENT, AND SCHEDULES ON THIS AND THE OPPOSITE SIDE GIVE A TRUE AND COMPLETE ACCOUNT OF THE CONDITION OF OUR (MY) BUSINESS ON THE DAY ABOVE STATED.

(SIGNATURE) John D Bentley

NOTE: IF YOU HAVE EVER FAILED IN BUSINESS ATTACH A COMPLETE EXPLANATION AND STATE BASIS OF SETTLEMENT WITH CREDITORS

1

25

ams EXC (19) NO. UT 17292

DISCOUNT $ DUE

$2,000.00 Las Vegas, NEVADA, April 16th, 1955

ON Demand; if no demand is made then on August 16th, 19 55 FOR VALUE RECEIVED I PROMISE TO PAY IN LAWFUL MONEY OF THE UNITED STATES OF AMERICA TO THE ORDER OF THE

BANK OF NEVADA
LAS VEGAS NEVADA

AT ITS OFFICE IN THIS CITY Two Thousand and no [illegible] DOLLARS

WITH INTEREST FROM date AT THE RATE OF [illegible] PER CENT PER ANNUM UNTIL PAID

PAYABLE ON demand AND THEREAFTER AND IN ADDITION THERETO IN THE EVENT OF COMMENCEMENT OF SUIT TO ENFORCE PAYMENT OF THIS NOTE SUCH ADDITIONAL SUM AS ATTORNEYS FEES AS THE COURT MAY ADJUDGE REASONABLE

ADDRESS 205 Fremont

TELEPHONE

/s/ John D. Bentley
/s/ Doris L. Bentley

EXHIBIT # C

[BACK]

26A

UT 17292 Bentley, ~~John D. & Doris~~ 8-16-55 2,000.00

INTEREST PAID			PAID ON ACCOUNT OF PRINCIPAL		
DATE	AMOUNT	PAID TO	DATE	AMOUNT	BALANCE
5-16-55	10 00	5 16 55	5-16	500.00	1 500 00
9-3-55	15 06	9 3 55	6-10-55	878.16	621 84
			9-3-55	621 84	-0-

For Value Received, I hereby [illegible]

State of Nevada
County of Clark

I, Earl K. Phillips, a Notary Public in and for the County of Clark, State of Nevada, duly commissioned and sworn, do certify that on the 29 day of September 1955 I [illegible] the within copy of Note [illegible] with the original thereof and [illegible] said original.

IN WITNESS [illegible] my hand and affixed my [illegible] County of Clark the day and year [illegible]

Earl K. Phillips

My Commission Expires 9-1-56

11F

D

(20)

FINANCIAL STATEMENT
INDIVIDUAL OR PARTNERSHIP

FINANCIAL STATEMENT OF

Received at First & Fremont Branch

NAME Bentley's Trading Post
BUSINESS Jewelry & Novelty
ADDRESS 205 Fremont St., Las Vegas, Nevada
AT CLOSE OF BUSINESS May 31, 1955

To BANK OF NEVADA
LAS VEGAS NEVADA

THE UNDERSIGNED FOR THE PURPOSE OF PROCURING AND ESTABLISHING CREDIT FROM TIME TO TIME WITH YOU AND TO INDUCE YOU TO PERMIT THE UNDERSIGNED TO BECOME INDEBTED TO YOU ON NOTES ENDORSEMENTS GUARANTEES OVERDRAFTS OR OTHERWISE FURNISHES THE FOLLOWING AS BEING A TRUE AND CORRECT STATEMENT OF THE FINANCIAL CONDITION OF THE UNDERSIGNED ON THE ABOVE DATE AND AGREES TO NOTIFY YOU IMMEDIATELY OF THE EXTENT AND CHARACTER OF ANY MATERIAL CHANGE IN SAID FINANCIAL CONDITION AND ALSO AGREES THAT IF THE UNDERSIGNED OR ANY ENDORSER OR GUARANTOR OF ANY OF THE OBLIGATIONS OF THE UNDERSIGNED AT ANY TIME FAILS IN BUSINESS OR BECOMES INSOLVENT OR COMMITS AN ACT OF BANKRUPTCY OR IF ANY DEPOSIT ACCOUNT OF THE UNDERSIGNED WITH YOU OR ANY OTHER PROPERTY OF THE UNDERSIGNED HELD BY YOU BE ATTEMPTED TO BE OBTAINED OR HELD BY WRIT OF EXECUTION GARNISHMENT ATTACHMENT OR OTHER LEGAL PROCESS OR IF ANY OF THE REPRESENTATIONS MADE BELOW PROVE TO BE UNTRUE OR IF THE UNDERSIGNED FAILS TO NOTIFY YOU OF ANY MATERIAL CHANGE AS ABOVE AGREED THEN AND IN SUCH CASE AT YOUR OPTION ALL OF THE OBLIGATIONS OF THE UNDERSIGNED TO YOU OR HELD BY YOU SHALL IMMEDIATELY BECOME DUE AND PAYABLE WITHOUT DEMAND OR NOTICE. THIS STATEMENT SHALL BE CONSTRUED BY YOU TO BE A CONTINUING STATEMENT OF THE CONDITION OF THE UNDERSIGNED AND A NEW AND ORIGINAL STATEMENT OF ALL ASSETS AND LIABILITIES UPON EACH AND EVERY TRANSACTION IN AND BY WHICH THE UNDERSIGNED HEREAFTER BECOMES INDEBTED TO YOU UNTIL THE UNDERSIGNED ADVISES IN WRITING TO THE CONTRARY

ASSETS	DOLLARS		CENTS
CASH IN Balboa Bank		543	44
CASH ON HAND Bank of Nevada		995	00
NOTES ~~Advanced to Brandon~~ LESS RESERVES	18	000	00
ACCOUNTS RECEIVABLE OF CUSTOMERS (NOT PLEDGED)* LESS RESERVES	10	031	88
*DO NOT INCLUDE AMOUNTS DUE FROM PARTNERS, EMPLOYEES OR RELATIVES. SEE BELOW			
MERCHANDISE FINISHED HOW VALUED Est	32	000	00
MERCHANDISE UNFINISHED HOW VALUED			
MERCHANDISE RAW MATERIAL HOW VALUED			
STOCKS AND BONDS LISTED AS PER SCHEDULE ON REVERSE			
STOCKS AND BONDS PLEDGED WITH BROKERS			
Leasehold Improvem'n	6	300	00
TOTAL CURRENT	67	870	32
STOCKS AND BONDS UNLISTED AS PER SCHEDULE ON REVERSE			
REAL ESTATE AS PER SCHEDULE ON REVERSE	159	722	22
MACHINERY $ FIXTURES $	17	016	89
AUTOMOBILES	7	493	91
*NOTES AND ACCOUNTS DUE FROM PARTNERS, RELATIVES, EMPLOYEES			
CASH VALUE LIFE INSURANCE			
OTHER ASSETS DESCRIBE			
TOTAL	252	103	34

LIABILITIES	DOLLARS		CENTS
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE Estimated	17	900	00
NOTES PAYABLE & TRADE ACCEPTANCES FOR MERCHANDISE UNSECURED			
NOTES PAYABLE TO BANKS B of N SECURED		670	00
NOTES PAYABLE TO BANKS UNSECURED			
NOTES PAYABLE TO OTHERS SECURED			
NOTES PAYABLE TO OTHERS UNSECURED			
ACCOUNTS PAYABLE NOT DUE			
ACCOUNTS PAYABLE PAST DUE			
AMOUNTS OWING TO BROKERS			
CHATTEL MORTGAGES			
CONTRACTS OF SALE OTHER THAN REAL ESTATE Auto	3	700	00
ACCRUED TAXES & INTEREST Estimated	2	500	00
DEPOSITS OF MONEY WITH US BY RELATIVES OR EMPLOYES			
TOTAL CURRENT	24	770	00
MORTGAGES OR LIENS ON REAL ESTATE SEE SCHEDULE REVERSE	86	157	00
RESERVE FOR DEPRECIATION	13	214	10
Deposit on Invent (In litigation)	26	800	00
Capitol Mrs. Bentley	17	500	00
NET WORTH Mr. Bentley	83	662	24
TOTAL	252	103	34

PROFIT AND LOSS STATEMENT FROM 1-1-55 TO 5-31-55

NET SALES AFTER RETURNS AND ALLOWANCES	44	554	72
LESS COST OF SALES	26	732	84
GROSS PROFIT ON SALES 40%	17	821	88
LESS EXPENSES SALARIES AND WAGES	9	265	37
INTEREST		88	59
TAXES		620	77
RENT	1	950	00
BAD DEBTS			
DEPRECIATION Estimated	1	500	00
OTHER EXPENSES	1	520	56
TOTAL EXPENSES	14	945	29
NET PROFIT FROM OPERATIONS			
ADD OTHER INCOME INVESTMENTS ETC			
NET PROFIT	2	876	59

RECONCILIATION OF NET WORTH

NET WORTH LAST STATEMENT SUBMITTED
ADD NET PROFIT
OTHER ADDITIONS (EXPLAIN)
TOTAL
LESS WITHDRAWALS
OTHER DEDUCTIONS (EXPLAIN)
TOTAL DEDUCTIONS
NET WORTH ON THIS FINANCIAL STATEMENT

GIVE TIME OF YEAR WHEN ITEMS BELOW ARE	AT MAXIMUM	AT MINIMUM
NOTES AND ACCOUNTS RECEIVABLE		
STOCK OF MERCHANDISE		
LIABILITIES		

AVERAGE TERMS OF PURCHASE SALE
BANK ACCOUNTS WHERE KEPT OTHER THAN ABOVE

CONTINGENT LIABILITY

AS GUARANTOR
ACCOMMODATION ENDORSEMENTS
ACCOUNTS NOTES OR TRADE ACCEPTANCES DISCOUNTED OR PLEDGED
SURETY ON BONDS OR OTHER CONTINGENT LIABILITY
LETTERS OF CREDIT

EXHIBIT "O"

F. D

(21)

INSURANCE

ON MERCHANDISE $

ON MACHINERY $

ON BUILDINGS $

AUTOMOBILES AND TRUCKS: PUBLIC LIABILITY $ / COLLISION $ / PROPERTY DAMAGE $

IS FALLEN BUILDING CLAUSE WAIVED IN POLICIES?

DO YOU CARRY EARTHQUAKE INSURANCE? HOW MUCH? $

LIFE INSURANCE? HOW MUCH? $

NAME OF BENEFICIARY

NAME OF COMPANY

DO YOU CARRY WORKMEN'S COMPENSATION INSURANCE?

ARE YOU BORROWING FROM ANY OTHER BRANCH OF THIS BANK?

HAVE YOU APPLIED FOR CREDIT AT ANY OTHER SOURCE?

LEASE HAS YEARS TO RUN MONTHLY RENTAL $

BUY PRINCIPALLY FROM

BOOKS ARE YOUR BOOKS AUDITED BY OUTSIDE ACCOUNTANTS?

IF SO GIVE NAME OF ACCOUNTANTS

TO WHAT DATE HAS INTERNAL REVENUE DEPT. EXAMINED YOUR BOOKS CONCERNING FEDERAL TAXES?

BASIS OF STATEMENT IF ACTUAL INVENTORY BY WHOM TAKEN AND DATE?

IF ESTIMATED BY WHOM MADE AND DATE

JUDGMENTS AGAINST US UNSATISFIED OR SUITS PENDING AGAINST US

COMMITMENTS ON UNFINISHED CONTRACTS OR PURCHASE OF GOODS $

SPECIFY ANY OF THE ASSETS OR LIABILITIES ORIGINATING FOR MERCHANDISE HELD ON CONSIGNMENT AND WHICH ARE SUBJECT TO AGENCY AGREEMENT

QUESTIONS, IF INDIVIDUAL.

1 WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS IN JOINT TENANCY?

2 WHAT PROPERTY LISTED ON EITHER SIDE OF THIS STATEMENT IS COMMUNITY PROPERTY?

3 ARE YOU A PARTNER IN ANY OTHER BUSINESS?

4 DO YOU DEAL OR CARRY ACCOUNTS WITH STOCKBROKERS?

QUESTIONS IF PARTNERSHIP

NAMES OF PARTNERS	AMOUNT CONTRIBUTED	OUTSIDE NET WORTH APART FROM THIS FIRM	OTHER BUSINESS CONNECTIONS

DATE OF ORGANIZATION OF PARTNERSHIP

LIFE OF PARTNERSHIP

NOTE: IF OPERATING UNDER FICTITIOUS STYLE EITHER AS AN INDIVIDUAL OR AS A PARTNERSHIP GIVE DATE OF FILING OF SAID STYLE

LIST OF REAL ESTATE AND IMPROVEMENTS WITH ENCUMBRANCES THEREON

DESCRIPTION STREET NUMBER LOCATION	TITLE TO PROPERTY IN NAME OF	ASSESSED VALUATION	VALUATION		MORTGAGES OR LIENS		HOLDER OF LIEN
			LAND	IMPROVEMENTS	DUE DATE	AMOUNT	
Westwood House		$	38,428.43			$ 13400	B of N
Edgewood House			5,000	58,000.00		38000	
Calif. R. E.				58,293.79		34757	
				159,722.22		86,157.00	

STOCKS AND BONDS: DESCRIBE FULLY. USE SUPPLEMENTAL SHEET IF NECESSARY. INDICATE IF STOCKS ARE COMMON OR PREFERRED. GIVE INTEREST RATE AND MATURITY OF BONDS.

NUMBER	NAME AND ISSUE	LISTED	UNLISTED	NUMBER	NAME AND ISSUE	LISTED	UNLISTED
		$	$			$	$

STATEMENT OF BANK OFFICER

INSOFAR AS OUR RECORDS REVEAL, THIS FINANCIAL STATEMENT IS ACCURATE AND TRUE. THE FOREGOING STATEMENT IS (A COPY OF) (THE ORIGINAL) SIGNED BY THE MAKER IN THE CREDIT FILES OF THIS BANK.

THE AVERAGE DAILY BALANCE FOR THE PAST YEAR HAS BEEN:

COML. A/C $ 500.00 SAV. A/C $

BANK OF NEVADA
LAS [illegible]AS, NEVADA

/s/ A. M. Smith

VICE PRES. [redacted] MANAGER

I SOLEMNLY DECLARE AND CERTIFY THAT THE ABOVE STATEMENT AND SCHEDULES ON THIS AND THE OPPOSITE SIDE GIVE A TRUE AND COMPLETE ACCOUNT OF THE CONDITION OF OUR (MY) BUSINESS ON THE DAY ABOVE STATED

(SIGNATURE) /s/ John D. Bentley

NOTE: IF YOU HAVE EVER FAILED IN BUSINESS ATTACH A COMPLETE EXPLANATION AND STATE BASIS OF SETTLEMENT WITH CREDITORS

SHEET NO. 10

Ex. "E"

SIGNATURE

SIGNATURE

SERVICE CHARGE WAIVED BY

HAS SAVINGS ACCT NO.

AFFILIATED WITH

STOCKHOLDER Yes ☐ No ☐

NAME BENTLEY'S TRADING POST

A

ADDRESS 205 Fremont

Las Vegas, Nev.

DATE	OLD BALANCE	CHECKS IN DETAIL			DEPOSITS	DATE	NEW BALANCE
APR 1'55	1,03121	11458-	30835-	159.70-		APR 1'55	44858*
APR 2'55	44858				21980	APR 2'55	66838*
JAN 4'55	66838				41855	JAN 4'55	1,086.93*
APR 6'55	1,086.93				196.95	APR 6'55	1,28388*
APR 7'55	1,28388				6.00 16395	APR 7'55	1,45383*
APR 8 SC	1,45383	1.95-				APR 8 SC	1,45188*
APR 8'55	1,45188	7650-				APR 8'55	1,37538*
APR 9'55	1,37538	550.00-			221.40	APR 9'55	1,046.78*
[illegible]	1,04678	1,71556-			550.00	[illegible]	~~11878~~
[illegible]	11878-				21655	[illegible]	9777*
[illegible]	9777	.50-	19607-	21225-	1,000.00	APR14'55 Hold	68895*
[illegible]	68895	.50-				APR15'55 133 Bal	68845*
	68845	11488-	9399-		2,000.00 32735	APR16'55 7395 2294	2,80773*
[illegible]	2,80773	6549- 12318-	8922- 22942-	500.00-	61100	APR18'55	2,41142*
[illegible]	2,41142	1,21965-	9747-	5700-		APR19'55	1,03730*
[illegible]	1,03730	7414- 14000-	43610-	50000-	18920	APR20'55	7626*
[illegible]	7626	~~18744~~				APR21'55	11118
[illegible]	11118-				~~18744~~	APR21'55	7626*
[illegible]	7626	1500-			21625	APR22'55	27751*
						APR23'55	12011
[illegible]	27751	~~39000-~~ MS	762-				
[illegible]	~~12011-~~				~~39000~~	APR23'55	26989*

SHE NO. 10

SIGNATURE

SIGNATURE

Service Charge Waived by

Has Savings Acct No.

Affiliated with

Stockholder Yes ☐ No ☐

NAME BENTLEY'S TRADING POST

ADDRESS 205 Fremont
Las Vegas, Nev.

B

DATE	OLD BALANCE	CHECKS IN DETAIL			DEPOSITS	DATE	NEW BALANCE
APR25'55	26	~~30.00-~~	.50-	.50-		APR25'55	31.11OD
APR25'55					~~300.00~~	APR25'55	268.89*
APR26'55	9				514.10	APR26'55	782.99*
APR2	[illegible]2.99	.50-			190.35	APR27'55	972.84*
APR28'55	972.84	700.00-				APR28'55	272.84*
APR29'55	272.84				88.53	APR29'55	361.37*
MAY 2'55	361.37				594.09	MAY 2'55	955.46*
MAY 3'55	955.46	300.00-				MAY 3'55	[illegible]55.46*
MAY 4'55	655.46	142.30- 114.71-	100.00-	206.75-	223.00 373.20	MAY 4'55	687.90*
MAY 5'55	687.90	19.00-	187.44-	136.16-	74.14	MAY 5'55	419.44*
MAY 5'55	419.44				202.40	MAY 5'55	621.84*
MAY 6'55	621.84	144.48-			189.45	MAY 6'55	666.81*
MAY 7'55	666.81				173.33	MAY 7'55	840.14*
MAY 7'55	840.14	159.70-				MAY 7'55	680.44*
MAY 9'55	680.44				459.10 218.20	MAY 9'55	1,357.74*
MAY 9'55	1,357.74	25.00-	100.00-			MAY 9'55	1,232.74*
MAY10'55	1,232.74				301.75	MAY10'55	1,534.49*
MAY10'55	1,534.49	114.08-	390.00-			MAY10'55	1,030.41*
MAY11'55	1,030.41				213.00	MAY11'55	1,243.41*
MAY11'55	1,243.41	50.00-				MAY1	1,193.41*
MAY12'55	1,193.41				300.00	MAY12'55	1,493.41*
MAY12'55	1,493.41	59.00-	~~307.55~~ 49	390.00-		MAY12'55	1,241.[illegible]
		80.34-	80.00-	700.70-			

B-106X 4-53

A

NO.

Ex. "E".

NATURE

SIGNATURE

Service Charge Waived By

Stockholder Yes ☐ No ☐

NAME MR. Y'S TRADING POST

ADDRESS 205 FREMONT

LAS VEGAS, NEV.

DATE	OLD BALANCE	CHECKS IN DETAIL			DEPOSITS	DATE	NEW BALANCE
MAY12'55	124.18-				~~307.55~~	MAY12'55	183.37*
[illegible]	183.37	44.89-	~~200.00-~~ ✓			MAY13'55	[illegible]
[illegible]	60.72-				200.00	MAY13'55	1[illegible]
MAY13'55	139.28	200.00-				MAY13'55	[illegible]
MAY14'55	60.72-				277.05	MAY16'55	216.33*
MAY16'55	216.33				1,010.00	MAY16'55	510 535
MAY16'55	1,226.33	.50- 50.00-	.50- 510.00-	545.00		MAY16'55	120.33*
MAY17'55	120.33				280.00	MAY17'55	400.33*
MAY17'55	400.33	97.47- 1.00- ~~200.00~~ ✓	~~5.77~~ ✓ 20.00- 40.00-	187.44- 50.00-		MAY17'55	201.35*
MAY17'55	201.35-				5.77 205.77	MAY17'55	4.42*
MAY18'55	4.42				284.00	MAY18'55	288.42*
MAY18'55	288.42	30.78-				MAY18'55	257.64*
MAY19'55	257.64				310.35	MAY19'55	567.99*
MAY19'55	567.99	20.00-				MAY19'55	547.99*
MAY20'55	547.99				325.05	MAY20'55	873.04*
MAY20'55	873.04	.50-	.50-			MAY20'55	872.04*
MAY21'55	872.04				113.00	MAY21'55	985.04*
MAY21'55	985.04	200.00- 93.83-	374.10-	307.55-		MAY21'55	9.56*
MAY23'55	9.56				477.00	MAY23'55	486.56*
MAY23'55	486.56	~~500.00~~ ✓				MAY23'55	13.44-
MAY23'55	13.44-				~~500.00~~	MAY23'55	486.56*
MAY24'55	486.56				292.00	MAY24'55	778.56*
MAY24'55	778.56	50.00- 5.77-	200.00-	39.60-		MAY24'55	483.19*

B-1092 4-53

SHEET NO.

SIGNATURE

SIGNATURE

SERVICE CHARGE WAIVED BY
HAS SAVINGS ACCT NO.
AFFILIATED WITH
STOCKHOLDER YES ☐ NO ☐

B

NAME BERKLEY'S TRADING POST

ADDRESS 205 FREMONT
LAS VEGAS, NEV.

DATE	OLD BALANCE	CHECKS IN DETAIL			DEPOSITS	DATE	NEW BALANCE
MAY25'55	483.19				244.07	MAY25'55	727.26*
MAY25'55	727.26	.50- 10.00-	~~300.00~~- 140.00-	99.60- 455.97-		MAY25'55	278.81∞
MAY25'55	278.81-				~~300.00~~	MAY25'55	21.19*
MAY26'55	21.19				376.75	MAY26'55	397.94*
MAY26'55	397.94	137.16- 19.70-	~~350.00~~	126.37-		MAY26'55	235.29∞
MAY26'55	235.29-				~~350.00~~	MAY26'55	114.71*
MAY27'55	114.71				200.00 264.30	MAY27'55	579.01*
MAY27'55	579.01	80.00-	200.00-			MAY27'55	299.01*
MAY28'55	299.01				233.55	MAY28'55	532.56*
MAY28'55	532.56	.50- 159.70-	.50- 59.64-	253.39-		MAY28'55	58.83*
MAY31'55	58.83				1,512.50	MAY31'55	1,571.33*
MAY31'55	1,571.33	500.00-	500.00-	120.64-		MAY31'55	450.69*
JUN 1'55	450.69				171.25	JUN 1'55	621.94*
JUN 1'55	621.94	200.00-				JUN 1'55	421.94*
JUN 2'55	421.94				228.43	JUN 2'55	650.37*
JUN 3'55	650.37				190.35	JUN 3'55	840.72*
JUN 3'55	840.72	136.50- 257.83-	350.00-	300.00-		JUN 3'55	203.61∞
JUN 3'55	203.61-				~~257.83~~	JUN 3'55	54.22*
JUN 4'55	54.22				250.50	JUN 4'55	304.72*
JUN 4'55	304.72	~~59.00~~	~~290.17~~	257.83-		JUN 4'55	302.28∞
JUN 4'55	302.28-				~~59.00~~ ~~290.17~~	JUN 4'55	46.89*
JUN 6'55	46.89	88.00- 240.56-	~~214.52~~	~~200.00~~	321.60	JUN 6'55	374.69∞
JUN 6'55	374.69-				~~200.00~~ ~~214.52~~	JUN 6'55	39.83*
JUN 7'55	39.83				394.68	JUN 7'55	434.51*

B-1051 4-53

SHEET NO. 12

SIGNATURE ____________________

SIGNATURE ____________________

SERVICE CHARGE WAIVED BY ____________

HAS SAVINGS ACCT NO. ____________

AFFILIATED WITH ____________

STOCKHOLDER Yes ☐ No ☐

A

NAME L[illegible]LEY'S TRADING POST

ADDRESS 205 FREMONT
LAS VEGAS, NEV.

DATE	OLD BALANCE	CHECKS IN DETAIL			DEPOSITS	DATE	NEW BALANCE
JUN 7'55	434.51	89.40-	.50-	.50-		JUN 7'55	344.11*
JUN 8 SC	344.11	2.85-				JUN 8 SC	341.26*
JUN 8'55	341.26	1.00-	17.00-		340.65	JUN 8'55	663.91*
JUN 9'55	663.91				214.25	JUN 9'55	878.16*
JUN10'55	878.16	~~30.00-~~	~~403.45-~~	~~35.00-~~			
		~~200.00-~~	878.16-		20.00 100	JUN10'55	648.45 878^{16}
JUN10'55	648.45-				~~200.00~~		
					~~30.00~~		
					~~35.00~~		
					~~403.45~~	JUN10'55	20.00*
JUN11'55	20.00	20.00- 100					
					191.65	JUN11'55	191.65
JUN11'55	191.65	~~993.93-~~	~~508.60-~~		271.10	JUN11'55	1,039.78
JUN11'55	1,039.78-				~~993.93~~		
					~~508.60~~	JUN11'55	462.75*
JUN13'55	462.75	508.60-	.50-	1.50-	377.80		
					109.25	JUN13'55	439.20*
JUN14'55	439.20				307.50	JUN14'55	746.70*
JUN14'55	746.70	.50-	~~252.23-~~	290.17-			
		214.52-				JUN14'55	10.72
JUN14'55	10.72-				~~252.23~~	JUN14'55	241.51*
					dep. 283.15 283.15	JUN15'55	2^{23} 524.66*
JUN15'55	241.51						
JUN15'55	524.66	~~100.00-~~	200.00-	252.23-		JUN15'55	27.57
					~~100.00~~	JUN15'55	72.43*
JUN15'55	27.57-					JUN16'55	232.16
JUN16'55	72.43	~~304.59-~~					
					~~304.59~~	JUN16'55	72.43*
JUN16'55	232.16-					JUN17'55	71.93*
JUN17'55	72.43	.50-				JUN18'55	956.07
JUN18'55	71.93	.50-	~~1,027.50-~~			JUN18'55	71.43*
					~~1,027.50~~		
JUN18'55	956.07-						
					188.72	JUN20'55	260.15*
JUN20'55	71.43						
					334.97	CN 1586 to 403^{45}	
JUN20'55	260.15				370.55		
					127.60	JUN20'55	1,093.27*

S-106X 4-53

28

(28)

Ex. F

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

NOTICE OF LEVY

TO (Name of person holding property, moneys, etc., belonging to taxpayer)

Bank of Nevada, 102 Fremont St., Las Vegas, Nevada.

You are hereby notified that there is now due, owing, and unpaid from

NAME AND ADDRESS OF TAXPAYER

J. D. Bentley, 205 Fremont St., Las Vegas, Nevada.

to the United States of America the sum of

One thousand sixty-nine and 70/100- - - - - - - - - - Dollars $1,069.70

for internal revenue taxes, to wit:

PERIOD AND TYPE OF TAX	DATE OF ASSESSMENT	ACCOUNT NO.	UNPAID BALANCE	STATUTORY ADDITIONS	TOTAL
3-54 WT-FICA	11-15-54	11-54 514	$ 804.50	$ 73.01	$ 877.51
4-54 Excise	3-1-55	2-55 70505	187.51	4.68	192.19
				TOTAL AMOUNT DUE	$1,069.70

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at Las Vegas, Nevada this 10th day of June 1955

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY (Signature)	TITLE
K. W. Evans	[illegible]	Group Supervisor - Collections

CERTIFICATE OF SERVICE

I hereby certify that this levy was served by handing a copy of this notice of levy to

NAME (and title) R. R. [illegible] Asst. Cashier

on June 12, 1955, at 1:30 p.m.

COLLECTION OFFICER (Signature) [illegible]

Exhibit "F"

29

(29)

Ex 56

Form 668
(Rev. Jan. 1955)

NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS

District
Reno, Nevada

Serial No.
LV-29

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of Taxpayer
J. D. Bentley

Residence or Place of Business
205 Fremont St., Las Vegas, Nevada.

NATURE OF TAX	ACCOUNT NO.	YEAR OR TAXABLE PERIOD	ASSESSMENT DATE	AMOUNT OF ASSESSMENT
EXCISE	2-55 70505	4Q54	23C 3-1-55	$ 187.51
			TOTAL	$ 187.51

WITNESS my hand at Los Vegas, Nevada, on this,

the 13th day of June, 19 55

District Director of Internal Revenue	By (Signature)	Title
(sgd) V. W. EVANS	(sgd) WENDELL D. RUBY	Group Supervisor Collections

NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien. G.C.M. 28410, C.B. 1954-1, 120.)

Ex. II, 10 Exhibit "9"

11p

(30)

Ex. "H"

38

Form 668-C (REV. JAN. [illegible])	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **FINAL DEMAND**

DISTRICT Reno, Nevada	DATE June 14, 1955

TO:

Bank of Nevada, 102 Fremont St., Las Vegas, Nevada.

On June 10th, 1955 there was served upon you a levy, by leaving with E. K. Phillips, Asst. Cashier at 102 Fremont St. a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by I. D. Beatley of 205 Fremont St., who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of $ 1,069.70. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $ 1,069.70, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE V. W. Evans	BY (Signature) Wendell A. [illegible]	TITLE Group Supervisor - Collections

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to

NAME A. M. Smith	TITLE Vice President & Manager	
PLACE First & Fremont Branch, Bk of Nevada	DATE 6/14/55	TIME 11:10 AM
COLLECTING OFFICER (Signature)		DATE [illegible]

119

Serbice witbessed by

COLLECTING OFFICER

Exhibit "H" [Endorsed]: Filed Aug. 28, 1956.

SHEET NO.

"E" "E"

SIGNATURE

SIGNATURE

32

DATE	OLD BALANCE						
JUN21'55	1,093.27	[illegible]				[illegible]	[illegible]
JUN22'55	654.82	390.00-			184.54	JUN22'55	449.36*
JUN23'55	449.36				294.30	JUN23'55	[illegible]
JUN23'55	743.66	229.42-				JUN23'55	[illegible]
JUN24 1955	514.24	.50-	245.96-	30.00-		JUN24	237.78*
JUN27'55	237.78				388.88	JUN27'55	626.66*
JUN30'55	626.66				[illegible]	[illegible]	[illegible]
JUL 1'55	756.70				300.00	[illegible]	[illegible]
JUL 2'55	1,056.70				197.15	JUL 2'55	1,253.85*
JUL 2'55	1,253.85	~~500.00~~	1,032.50-			JUL 2'55	[illegible]
JUL 2'55	278.65-				500.00	JUL 2'55	221.35*
JUL 5'55	221.35				385.50 134.00 474.79	JUL 5'55	1,215.64*
JUL 6'55	1,215.64	.50-	~~540.00~~	1,000.00-	118.00	JUL 6'55	206.86-
JUL 6'55	206.86-				540.00	JUL 6'55	333.14*
JUL 8'55	333.14	.50-				JUL 8'55	332.64*
JUL11'55	332.64	304.59-				JUL11'55 304.57	28.05*
JUL12 SC	28.05	2.40-				JUL12 SC	25.65*
JUL14'55	25.65	~~540.00~~				JUL14'55	514.35-
JUL14'55	514.35-				540.00	JUL14'55	25.65*
JUL18'55	25.65	.50-				JUL18'55	25.15*
JUL29'55	25.15				500.00	JUL29'55	525.15*
JUL29'55	525.15	500.00-	4.40-			JUL29'55	20.75*
AUG10 SC	20.75	.80-				AUG10 SC	19.95
AUG18'55	19.95				355.70	AUG18'55	375.65*
SEP 2'55	375.65	200.00-			343.87	SEP 2'55 200	519.52*
SEP 3'55	519.52	681.07-	636.90-		276.00 2,000.00	SEP 3'55	1,477.55*
SEP 6'55	1,477.55	50.00-	70.38-	500.00-		SEP 6'55	1,057.17*

KB

a Stop

B-100X 4-55

LIBRARY
SUPREME COURT U. S.

Office Supreme Court, U.S.
FILED
MAR 13 1958
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 852

BANK OF NEVADA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

RECEIVED
MAR 13 1958
OFFICE OF THE CLERK
SUPREME COURT, U. S.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

MILTON W. KEEFER,
B. MAHLON BROWN,
Cornet Building, Las Vegas, Nevada,
✓ CHRISTOPHER M. JENKS,
405 Montgomery Street,
San Francisco 4, California,
Counsel for Petitioner,
Bank of Nevada.

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
405 Montgomery Street, San Francisco 4, California,
Of Counsel.

Subject Index

Page

Citations to opinions below 1

Jurisdiction 2

Question presented 2

Statutes involved 2

Statement of the case 2

Reasons for granting the writ 6

Conclusion 11

Table of Authorities Cited

Cases

Pages

Karno-Smith Co. v. Maloney (1940), 112 F.2d 690 9

North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co., 152 U.S. 596 9

United States v. Bank of Shelby (5th Cir. 1934), 68 F.2d 538 .... 2, 6, 7, 8, 9

United States v. Bank of United States (S.D.N.Y. 1934), 5 F.Supp. 942 .... 2, 6, 7, 8

United States v. Security Trust and Savings Bank (1950), 340 U.S. 47 .... 9, 10

United States v. Western Union Telegraph Co. (1931), 50 F.2d 102 9

United States v. Winnett (1947), 165 F.2d 149 .... 9, 10

Statutes

Internal Revenue Code of 1954:
  Sections 6321, 6322 and 6323 2
  Section 6323(c) 10
  Section 6331 2
  Section 6332 .... 2, 5

Nevada Compiled Laws 1929, Section 8737 3

28 U.S.C., Section 1254(1) 2

In the Supreme Court
OF THE
United States

October Term, 1957

No.

Bank of Nevada,
Petitioner,

vs.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 31, 1957.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court printed in Appendix B hereto is reported in 155 F.Supp. 164. The opinion of the Court of Appeals printed in Appendix B hereto has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 31, 1957. Rehearing was denied on February 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

Whether the right of a bank, when served with a notice of levy, to set-off a depositor's account against a loan made after the tax lien arose, as set forth in *United States v. Bank of Shelby* (5th Cir. 1934), 68 Fed.2d 538, and *United States v. Bank of United States* (S.D.N.Y. 1934), 5 F.Supp. 942, has been abrogated without any substantive change in the applicable statutes.

STATUTES INVOLVED.

The statutory provisions involved are Sections 6321, 6322, 6323, 6331 and 6332 of the Internal Revenue Code of 1954. They are printed in Appendix A.

STATEMENT OF THE CASE.

J. D. Bentley of Las Vegas was a regular customer of petitioner, Bank of Nevada. He maintained an active commercial account from time to time secured financial accommodation from the bank. In this connection he furnished periodic financial statements. The three which are important in the present case were dated August 31, 1954, February 28, 1955, and May 31, 1955 (R. 17-18, 15-16 and 20-21). All of the financial statements contained an identical agreement regarding transactions between Bentley and the bank. This agreement so far as pertinent here provides that "if any deposit account of the undersigned [Bentley] with you [the bank] be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, * * * then in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice." The purpose of this argeement and its relation to the right of set-off is obvious. However, such an agreement may have been unnecessary in view of Section 8737 of Nevada Compiled Laws 1929, which reads:

> "Every garnishee shall be allowed to retain or deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, * * *."

The right of set-off which the bank asserted in the present case arose in connection with a loan of $2,000.00 which the bank made to Mr. Bentley on April 16, 1955 and credited to his commercial account (R. 22). The loan was evidenced by a promissory note due on demand, or "if no demand is made, then on August 14, 1955" (R. 19), and was subject to the right of set-off upon service of legal process. When the loan was made the bank did not have actual knowledge of the federal tax lien in the amount of $804.50 which was assessed on November 15, 1954, but not recorded until January 12, 1955 (R. 14), and of course the bank could not have any knowledge of the unrecorded federal tax lien in the amount of $187.51 which had been assessed May 1, 1955, but was not recorded until June 13, 1955 (R 19).

Bentley's account was active, with many deposits and many withdrawals. The government does not question the withdrawals, even those made after the liens arose. The government's position regarding relations between a bank and its customers in the ordinary course of business is set forth in Rev. Rul. 57-367, 1957-32 Int. Rev. Bull. 22, printed in full in Appendix A. This ruling says, in substance, that in the absence of negligence or fraud, a bank, without actual notice or knowledge of the existence of a federal tax lien (as distinguished from constructive notice) will not incur liability to the government by permitting withdrawals by a depositor against whom a federal tax lien is outstanding.

On June 10, 1955, Bentley's account showed a balance of $878.16 (R. 26). On that date, at 1:45 P.M., a notice of levy was served on the bank (R. 28). Later on the same day the bank notified the District Director by letter that the balance of $878.16 had been set-off against Bentley's debt to the bank and that, therefore, the bank did not hold any funds subject to levy (R. 12).

On June 14, 1955, a final demand was served on the bank (R. 12-13), and on September 28, 1955, the government filed suit against the bank for the $878.16 plus interest at the rate of 6% per annum and costs under Section 6332 of the Internal Revenue Act. This is not a suit against the taxpayer, but a penalty suit against the bank "in its own person and estate."

The government contends, as we understand it, (a) that the bank had no right of set-off because the loan was made after the lien arose, even though the bank did not have actual knowledge of the recorded lien and could not have had any knowledge of the unrecorded lien, and (b) that the right of set-off, if it existed, was waived because the set-off was made "after" the levy was served.

The bank contends (a) that the loan and the right of set-off are inseparable in that both arose out of the same transaction, one being the consideration for the other; (b) that the balance in Bentley's account was not his money but the bank's money which he could use only until "a writ of execution, garnishment, attachment or other legal process" was served on the bank; and (c) that the right of set-off was exercised at the moment the levy was served, even though it took a few moments to walk to the ledger, ascertain the balance and make the entry.

The District Court held that the bank was liable and said (155 F.Supp. 167-168) "the Bank had no right to set-off and apply the funds in Bentley's account on the promissory note."

The Court of Appeals affirmed on the grounds (a) that the right of set-off was inchoate and therefore inferior to the tax lien; (b) that in the absence of a "demand" the note was not intended to be payable until August 14, 1955, despite the agreement that it became due at the option of the bank "without demand or notice" when the levy was served; and (c) that the right of set-off was exercised "after" rather than at the time the levy was served. Both *United States v. Bank of Shelby,* supra, and *United States v. Bank of United States,* supra, were cited by petitioner as appellant below, but neither of them is mentioned in the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT.

1. Although the opinion below did not mention the decision of the Fifth Circuit in *United States v. Bank of Shelby,* supra, there is a direct conflict. The tax lien involved in the *Bank of Shelby* case was assessed on March 12, 1925, against one Toler. The bank loaned Toler $10,000 on June 8 and took a note due the following November. Of this amount, $6,400 was applied to past due unsecured notes which Toler owed the bank, and the difference was put to his credit on the books; in other words, deposited to his account. Apparently there was a small existing balance because the actual amount in the account at the time of the levy was $3,646.52. The deputy collector inquired at

the bank on June 17, was told the amount of the balance, and notified the bank not to allow any withdrawals. The levy was served the next day, June 18, and payment was refused. The demand and refusal were repeated in February, 1926, and in August, 1926, and the United States then sued the bank and a vice president to recover the amount of the deposit. The bank defended on the ground that at the time of the demand nothing was owed to Toler because the deposit was offset by the note.

The Fifth Circuit in upholding the right of set-off did not base its decision on the insolvency of the taxpayer. Instead the court said:

> "But there is present here another potent fact, that the two obligations arose out of the same transaction and the one is the consideration for the other. It would be manifestly inequitable to enforce one obligation when the other cannot be enforced." 68 F.2d 539.

A careful reading of the *Bank of Shelby* case indicates that it is in direct conflict with the case here presented. We realize that *United States v. Bank of United States* (S.D.N.Y. 1934) 5 F.Supp. 942, being a district court case does not present a direct conflict between the circuits; however, it, with the *Bank of Shelby* case, represented what was believed to be the law prior to the instant case.

2. The question presented by this case and the two other bank cases upon which we rely is of obvious and great importance in the day to day banking transactions throughout the nation. Although, as indicated,

United States v. Bank of United States, supra, is a district court case, it appears to be indistinguishable from the present case; it did not involve insolvency and the tax lien arose prior to the time the loan was made. Like the instant case, the taxpayer had made deposits and withdrawals from the time the loan was made until the levy was received. The district court, in upholding the right of set-off pointed out that while the taxpayer was indebted to the bank he was really operating his account under what may be called a "revocable license" with the bank and that certainly in the absence of circumstances which would amount to an estoppel this would not be a basis "for letting the garnisher come in and take something which the depositor himself did not have." (5 F.Supp. 945). The *Bank of Shelby* case was decided January 23, 1934, and the *Bank of United States* case was decided February 6, 1934. Since that time the banks throughout the country have relied upon these two cases. There has been nothing to the contrary until the present case and the government admitted in its brief below that there has been no substantive change in the applicable statutes. During this time (24 years) banks throughout the country have relied upon the right to set-off when a notice of levy is received even though the loan was made without actual knowledge of an existing tax lien. We shall not speculate on the impact of the decision below on banking practices and the availability of credit, but settlement of the question by this court is plainly in the public interest.

3. The decision below is believed to be erroneous. Not only is it in conflict with *United States v. Bank*

of Shelby, supra, but it is contrary to the established principle set forth in *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.,* 152 U.S. 596, 619, which said that a garnishee "takes the shoes of the principal debtor and can assert only the rights of the latter."

There can be doubt that this principle applies to the Collector. The Fifth Circuit said in *United States v. Bank of Shelby, supra,* "the United States can claim only under and through him and subject to the defenses and equities affecting him." (68 F.2d 540). The Third Circuit said in *Karno-Smith Co. v. Maloney* (1940) 112 F.2d 690, 692, "the rights of the Collector rise no higher than those of the taxpayer whose right to property is sought to be levied upon," citing the decision of the Second Circuit in *United States v. Western Union Telegraph Co.* (1931), 50 F.2d 102.

The Ninth Circuit had previously recognized this same principle in *United States v. Winnett* (1947), 165 F.2d 149, but refused to apply it to the present case where there was no showing of insolvency and where the debt arose after the liens attached. We see no basis for the distinction. Mr. Bentley's right or "revocable license" to use the credit balance in his commercial account was at all times after the loan was made on April 16, conditioned upon and subject to the right of the bank to declare the debt due without demand or notice and to set-off when a levy or any other legal process was served; without the loan (subject to this condition) there would have been no balance in the account.

The court below also suggested that this court in *United States v. Security Trust and Savings Bank*

(1950), 340 U.S. 47, had "frowned" upon the doctrine of "relation back" and to that extent possibly weakened the effect of the *Winnett* case which depended upon an agreement made before the tax lien arose.

United States v. Security Trust and Savings Bank, supra, and the cases which have followed it deal with priorities of various liens and should not control a right of set-off which was part of the consideration for the debt. The right of set-off in our opinion is not a lien. This seems to follow from the fact that money on deposit in a bank belongs to the bank subject to the rights of the depositor, and a bank cannot have a lien on its own property. However, the government suggested in the court below that the right of set-off might be a lien, and it so would be subordinated to a prior tax lien. This overlooks one pertinent fact. The only possible lien would be a pledge dependent upon possession, and Section 6323(c) of the Internal Revenue Code makes the tax lien invalid, even though recorded, against the bank as a bona fide pledgee of a "security" which by definition includes "money."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

March 11, 1958.

Respectfully submitted,
MILTON W. KEEFER,
B. MAHLON BROWN,
CHRISTOPHER M. JENKS,
Counsel for Petitioner,
Bank of Nevada.

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

Internal Revenue Code of 1954.

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) *Invalidity of lien without notice*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws*—In the office designated by the law of the State or Territory in

which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of notice*—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in case of securities*—

(1) *Exception*—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's

worth, if at the time of such mortgage, pledge or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security*—As used in ~~this~~ subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) *Disclosure of amount of outstanding lien*—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

SEC. 6331. LEVY AND RESTRAINT

(a) *Authority of Secretary or delegate.* If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and sale of property*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) *Successive seizures*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY

(a) *Requirement*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for violation*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 per cent per annum from the date of such levy.

(c) *Person defined*—The term "person," as used in subsection (a) includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under duty to surrender the property or rights to property, or to discharge the obligation.

The provisions of Sections 3670, 3671, 3672, 3690 and 3710 of the Internal Revenue Code of 1939 are substantially the same as the provisions of the 1954 Code which are set forth above. The above provisions of the 1954 Code are applicable after January 1, 1955, to all internal revenue taxes whether imposed by the 1939 or 1954 Codes. Section 7851(a)(6)(B) of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Sup.II, Sec. 7851).

Rev. Rul. 57-367, 1957-32 Int. Rev. Bull. 22:

Advice has been requested whether banks, acting in the ordinary course of business with a depositor, without any knowledge of Federal tax liens having been filed against the depositor, and in the absence of negligence or fraud are subject to the rule of constructive notice of such liens.

G.C.M. 5432, C.B. VIII-1, 134 (1929), holds, in part that a notice of lien filed by a Collector of Internal Revenue (now District Director) with the proper official covers all property and property rights, whether real or personal, belonging to a delinquent taxpayer, and operates as a lien on bank deposits of the taxpaper and on debts due a taxpayer, even though a specific notice of the lien has not been served on the bank or on the debtors of the delinquent taxpayer.

To the extent here pertinent, G.C.M. 5432 stands for the proposition that debts due a taxpayer and bank accounts constitute property or rights to property subject to the Federal tax lien and that anyone (including a bank) who, in relation to such property, acquires the status of a mortgagee, pledgee, purchaser, or judgment creditor after notice of lien has been filed, does so subject to all the provisions of law under which the lien is valid and effective, irrespective of whether he had actual notice of the lien. However, where a bank acting in the ordinary course of business with a depositor, does not have actual notice or knowledge of the existence of a Federal tax lien (as distinguished from constructive notice given by the filing of a notice of lien as prescribed in the Internal Revenue Code of 1954), and in the absence of negligence or fraud, the bank will not incur liability to the Government in making payments to a depositor or on the order of a depositor, against whom a Federal tax lien is outstanding, to the extent of the amount the depositor has on deposit with the bank.

Where a bank does have actual notice or knowledge of the existence of a Federal lien against a depositor, the principles under which adverse interests in or to property or rights to property are entitled to protection may be applicable. In such cases, if the person against whom the lien is outstanding fails to take appropriate action to obtain its release, or to obtain a discharge of the property from the lien, the bank may protect itself against the possibility of liability to the Government by notifying the District Director of Internal Revenue of the facts and by requesting advice as to the action to be taken to enforce the lien, meanwhile withholding payment of the sum in question.

G.C.M. 5432, C.B. VIII-1, 134 (1929) is amplified.

Appendix B

In the United States District Court
in the District of Nevada

United States of America, Plaintiff, v. Bank of Nevada, Defendant,	Civ. No. 135 Mar. 14, 1957

FOLEY, District Judge.

The case was submitted upon stipulation of facts together with attached exhibits and supplemental stipulation filed November 7, 1956. The parties are in agreement as to the questions presented for determination, viz.:

1. Whether the defendant was in possession of property of the delinquent taxpayer which was subject to the tax lien sought to be levied against said bank deposits of the taxpayer, and

2. Whether a Federal tax lien on the bank account of a delinquent taxpayer is superior to the claimed right of setoff in the Bank by virtue of the taxpayer's note to the Bank executive after the tax lien arose, or by virtue of an agreement between the Bank and the taxpayer contained in a financial statement executed with the Bank before the tax lien arose.

However, the Bank's contentions are largely based upon its assumption that the taxpayer's note was payable at any time without demand.

In United States v. Graham, D.C., 96 F.Supp. 318, 320, affirmed State of California v. United States, 9 Cir., 195 F.2d 530, Judge Harrison held:

> "[4-6] The contention that there is no property against which the plaintiff's tax liens may be foreclosed is without support. 'Congress intended to subject all of a taxpayer's property, except that specifically exempt to the payment of taxes. "Property" is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. "Property" within the tax laws should not be given a narrow or technical meaning.' Citizens State Bank of Barstow, Texas v. Vidal, 10 Cir., 114 F.2d 380, 382.
>
> * * *
>
> "[7] There yet remains the question of whether or not the state may set off against its debt to the taxpayer the taxes owed by the taxpayer to the state. It is unquestioned that under Secs. 3672 and 3710(a), Title 26 U.S.C.A., the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon. United States v. Winnett, 9 Cir., 1947, 165 F.2d 149. If the state had a right of set-off against the taxpayer prior to the United States' asserted lien and priority, the Collector would be bound to recognize the right of the state to set-off.
>
> "[8] The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months before the leases with the State

> of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state accrued with a lien impressed upon it. There was no period of time in which the state of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien. In United States v. Winnett, supra, the right of set-off accrued before any tax liens arose."

The sum of $878.16 on deposit with defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of Internal Revenue, property of Bentley, the taxpayer.

The financial statements, Exhibits "B" and "B-1", executed prior to the loan evidenced by the note of April 16, 1955, each contained the following:

> "The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by

> you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then and in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary."

Upon the above quoted paragraph of the financial statements and the note of April 16, 1955, the Bank bases its claimed right of setoff. The note provided that:

> "On Demand; if no demand is made then on August 14th, 1955, for value received I promise to pay in lawful money of the United States of America, to the order of the Bank of Nevada * * * Two Thousand and no/100 Dollars. * * *"

> "Although the maker of a demand note is not in default until he refuses payment until after demand therefor, it is generally held that a note payable on demand is due immediately, so that suit may be maintained on it at any time after delivery without any other demand than the suit. This rule may not apply, however, where there is something on the paper or in the circumstances under which it was given to show that it was not

the intention that it should become due immediately." 10 C.J.S. Bills and Notes § 274b, p. 744; Sullivan v. Ellis, 8 Cir., 219 F. 694, 696, citing 7 Cyc. 848, 849.

[1] From the above quoted portion of the note it appears that it was not the intention of the payee or the maker of the note that the same was to be due immediately upon delivery. It was the evident intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the Bank for payment was made.

Defendant Bank, in its brief, states:

> "* * * the bank had a right of set off and thereby a lien upon any funds of the taxpayer on deposit with it, which arose prior in time to the date of November 15, 1954, which was the date upon which the tax lien arose. This lien of the bank was created by virtue of the financial statement dated August 31, 1954, (Exhibit B-1), wherein the bank was given the right by the depositor to apply any and all funds against any and all indebtedness of the taxpayer-depositor without demand and without notice to the taxpayer-depositor when and as certain conditions existed or came into being which jeopardized the claim of the bank under its promissory demand note, and which materially changed the taxpayer's-depositor's financial condition."

On June 10, 1955, the taxpayer had on deposit with defendant Bank in a checking account the sum of $878.16. On November 15, 1954, Withholding and Federal Insurance Contribution Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against the taxpayer. On March 1, 1955, Federal Excise taxes for the calendar year 1954 in the amount of $187.51 were assessed against the taxpayer.

On June 10, 1955, the District Director of Internal Revenue caused to be served upon the Bank a Notice of Levy covering both of the assessments. As has been noted, at the time of the service of the levy, no part of the obligation secured by the note was due and no contention is made that at that time the taxpayer was insolvent.

Therefore, the principles stated in the following quotation can have no application here:

> "The propriety of allowing the offset is at once apparent, and, in view of the fact that the lessor had become insolvent, it is immaterial that under the terms of the lease the return of the deposit was not yet due. In City Investment Company v. Pringle, 73 Cal.App. 782, 239 P. 302, the court reviewed the authorities relating to set-offs against insolvent debtors, and there said at page 791 of 73 Cal.App., 239 P. 302, 306, '* * * insolvency itself is a sufficient ground for the application of equitable set-off, and the fact, that the indebtedness on one side is not due when set-off is claimed, constitutes no obstacle to the assertion of the right as against an insolvent debtor.' " Gordon v. Foote, 120 Cal. App. 76, 7 P.2d 709, 710.

On the same day, June 10, 1955, after service of the levy, the Bank attempted to exercise its claimed right of setoff of the balance remaining unpaid on the note against the $878.16 on deposit to the credit of the taxpayer. From Exhibit "E" it appears that for the period beginning April 1, 1955, to September 6, 1955, the Bank accepted taxpayer's deposits and honored his withdrawals. The exhibit indicates substantial withdrawals by depositor for several months after the claimed right of setoff.

[2, 3] The Federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank, if such right existed.

The Court's attention has been called to § 8737, Nev. Comp.Laws 1929, which is as follows:

> "Every garnishee shall be allowed to retain or deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, * * *."

That this state law cannot give superiority to the Bank's claimed right of setoff over the pre-existing liens is made apparent by Mr. Chief Justice Stone in State of Michigan v. United States, 317 U.S. 338, 340, 63 S.Ct. 302, 87 L.Ed. 312, where he stated:

> "We do not stop to inquire whether this construction of the state statutes is the correct one, for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitu-

> tional power 'to lay and collect taxes.' Article I, § 8 of the Constitutional power 'to lay and collect U.S. 210, 13 S.Ct. 846, 37 L.Ed. 705. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be 'the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'
>
> " 'It is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere.' * * * Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. United States v. Snyder, supra; United States v. City of Greenville, 4 Cir., 118 F.2d 963."

Even if any rights the Bank might have had under the Nevada statute had the dignity of a lien, no right under that statute could displace the prior tax liens existing here.

On June 10, 1955, and prior thereto, the amount on deposit to the credit of Bentley was burdened with the prior existing Federal tax liens. On that date Bentley was solvent and the note of April 16, 1955, had not matured and would not become payable prior to August 14, 1955, in the absence of a demand. In the face of these facts, the Bank had no right to set off and apply the funds in Bentley's account on the promissory note.

Upon the stipulation of the parties, the Court finds:

Findings of Fact.

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by §§ 1340 and/or 1345 of Title 28 U.S.C.A. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the taxpayer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "A."

5. On February 28, 1955, and on August 31, 1954, the taxpayer submitted to the Bank of Nevada financial statements, Exhibit "B" and "B-1" respectively.

6. On March 1, 1955, certain Federal Excise taxes for the calendar year 1954 in the amount of $187.51 were assessed against the taxpayer, and on that same

date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley, and his wife, Doris L. Bentley, borrowed $2,000 from the Bank of Nevada and executed a promissory note in favor of the Bank for that amount, Exhibit "C".

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, Exhibit "D".

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than $878.16, Exhibit "E". On that day, June 10, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p. m. This Notice of Levy covered both of the assessments, referred to in Findings Nos. 3 and 6, together with statutory additions thereto, Exhibit "F".

10. On that same day, A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada wrote to H. L. Collomb, Collection Officer, as follows:

> "This will acknowledge receipt of your Notice of Levy against J.D. Bentley, which was served on our Mr. Phillips at 1:45 P.M. today.
>
> "I would like to take this opportunity to inform you that we have exercised our right to set off and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in Finding No. 7, which, at the time of the levy, amounted to approximately $1,500.

11. The Bank of Nevada did, on the 10th day of June, 1955, subsequent to 1:45 p. m. of said day, exercise its "claimed" right of setoff and applied the funds in this account to the taxpayer's unsecured indebtedness.

12. On June 13, 1955, a notice of Federal tax lien pertaining to the assessment of Federal Excise taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "G".

13. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Final Demand, Form 668-C, upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, at 11:10 a. m., Exhibit "H".

Conclusions of Law.

The Court concludes:

1. That plaintiff's tax liens are paramount and valid liens and that plaintiff is entitled to judgment in the amount of $878.16 plus legal interest and costs as provided by § 6332, Internal Revenue Code 1954, 26 U.S.C.A. §6332.

The plaintiff, United States of America, shall submit a form of judgment to the Court for approval.

United States Court of Appeals
For the Ninth Circuit

Bank of Nevada, Appellant, vs. United States of America, Appellee.	No. 15,541 Dec. 31, 1957

Appeal from the United States District Court for the District of Nevada

---

Before STEPHENS, Chief Judge, LEMMON and HAMLEY, Circuit Judges

LEMMON, Circuit Judge.

While the Internal Revenue Code of 1954 "contains a variety of important changes in the estate and gift tax areas",[1] it has left untouched the well established principle that the amount of an unpaid tax "shall be a lien in favor of the United States upon all property and rights to property"[2] of the delinquent taxpayer.

No government worthy of the name will permit itself to be rendered incapable of collecting the public fisc.

---

[1] "Revision of the Federal Estate and Gift Taxes: The Internal Revenue Act of 1954", by Marvin Chirelstein and Benjamin M. Shieber, *Stanford Law Review, December*, 1954, Volume 7, Number 1, page 40.

[2] Internal Revenue Code of 1954, §6321, *infra.*

At any rate, in this respect at least, the United States Government has not been left impotent.

1. *Statement of Facts*

The facts as found by the Court below were entirely stipulated. They may be summarized as follows—with especial regard to the chronology, since time-sequence is important here:

On November 15, 1954, certain Witholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the taxpayer. On the following day the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

On January 12, 1955, a notice of tax lien pertaining to this assessment was filed with the County Recorder of Clark County, Nevada.

On February 28, 1955, and on August 31, 1954, the taxpayer submitted financial statements to the appellant. Each statement read in part as follows:

> "The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change in said financial condition, and also agrees

> that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then and in such case, *at your option,* all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary." [Emphasis supplied.]

On March 1, 1955, certain Federal excise taxes for the calendar year 1954 amounting to $187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment. Demand was made upon him to pay it, but he has refused to do so.

On April 16, 1955, the taxpayer and his wife, Doris L. Bentley, borrowed $2,000 from the appellant and executed a promissory note in favor of the appellant for that amount.

On May 31, 1955, the taxpayer submitted to the appellant another financial statement, containing the same provision relating to the appellant's right of set-off that has been quoted *supra.*

On June 10, 1955, the taxpayer had on deposit in an account with the appellant "the sum of not less than $878.16". At 1:45 p.m. on that day, the appellee, through one of its collection officers, served a "Notice of Levy" upon the appellant by delivering it to E. K. Phillips, the assistant cashier. This Notice of Levy covered both of the assessments referred to above.

On that same day, A. M. Smith, vice president and manager of the appellant's First and Fremont Branch, wrote to the appellee's collection officer as follows:

> "This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.
>
> "I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in the above letter was the balance of the note for $2,000, referred to above, which balance, at the time of the levy, amounted to approximately $1,500. The appellant exercised its "claimed" right of setoff *subsequently* to 1:45 p.m. on June 10, 1955, the precise time at which the appellee's collection officer delivered the Notice of Levy to the appellant's assistant cashier. The appellant concedes that it exercised its right of setoff "thereafter."

On June 13, 1955, a notice of Federal tax lien pertaining to the assessment of Federal excise taxes was filed in the office of the County Recorder of Clark County, Nevada.

On June 14, 1955, the appellee's collection officer served a final demand upon the appellant's vice president and manager of its First and Fremont Branch.

On September 28, 1955, the appellee filed suit in the Court below to recover from the appellant the sum of $878.16, with interest and costs. As we have seen, that sum represented the amount which the taxpayer had on deposit with the appellant on June 10, 1955.

The case was submitted upon a stipulation of facts, together with attached exhibits.

The District Court held that the appellee's "tax liens are paramount and valid liens," and that the appellee was entitled to judgment as prayed for.

On March 29, 1957, the District Court handed down a judgment accordingly.

On April 5, 1957, the Notice of Appeal was filed.

2. *The Appellant's Contentions*

The appellant's argument may be summarized as follows:

The trial court erred in "ignoring the established principle that the bank has a general lien or right of setoff against the deposits of the despositor for the indebtedness of the depositor to the bank."

The Court erred in finding that the promissory note was not a demand note and due immediately upon delivery.

There was no property of the depositor-taxpayer in the possession of the appellant subject to the tax lien.

The right of set-off in the appellant was paramount to the appellee's tax lien.

3. *The Applicable Statute*

The pertinent sections of the Internal Revenue Code of 1954 are the following:

> "*§6321. Lien for taxes*
>
> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> "*§6322. Period of Lien*
>
> "Unless another date is specifically fixed by law, the lien imposed by ~~section~~ 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

"*§6323. Validity against mortgagees, pledgees, purchasers, and judgment creditors*

"(a) *Invalidity of lien without notice.*—

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary [of the Treasury] or his delegate— * * *

"*§6331. Levy and distraint*

"(a) *Authority of Secretary or delegate.*— If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

"*§6332. Surrender of property subject to levy*

"(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

4. *Liens for Federal Taxes and the Provisions for Their Collection Are Strictly Federal and Strictly Statutory*

At the ouset, what appears to be a basic misconception of the appellant should be cleared up. In its main brief, the appellant cites a number of state decisions to the effect, *inter alia,* that a party in the appellant's position "has a general lien or right of set off against the deposits of the depositor for the indebtedness of the depositor to the bank"; and that there is a right to set off enjoyed by a bank "by virtue of a specific agreement with its depositor", and that only the sum left, "after deducting the debits from the credits, in favor of the depositor was the balance or property *subject to the tax lien.*" [Emphasis supplied]

The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly *Federal* and strictly *statutory.* Those provisions are unaffected by any alleged "general rule" that a bank has a "general lien" upon deposits.

In United States v. Security Trust & Savings Bank, Executor, 1950, 340 U.S. 47, 49-50, the Court said:

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is *always* a Federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by this Court." [Emphasis supplied.]

Again, in United States v. Acri, 1955, 348 U.S. 211, 213, the Supreme Court used the following language:

> "The relative priority of the lien of the United States for unpaid taxes is, as we said in *United States v. Waddill Co.,* 323 U.S. 353, 356, 357; *Illinois v. Campbell,* 329 U.S. 362, 371; *United States v. Security Trust Co.,* 340 U.S. 47, 49, always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court. [Cases cited.]"

This Court likewise has adhered to the Federal norm in evaluating a Federal tax lien. In MacKenzie v. United States, 9 Cir., 1940, 109 F.2d 540, 541, Judge Stephens said:

> "The federal tax lien is entirely statutory, therefore its scope and effect are to be determined solely by the statute and the decisions interpreting it."[3]

5. *The Appellant Could Not Shield the Taxpayer's Account By an Inchoate Agreement with Its Depositor or by a Claimed Equitable Right of Setoff Springing From a Debt Not In Existence When the Tax Liens Arose.*

Section 6332(a), *supra,* gives the appellant only two defenses; namely, (1) that it was not in possession of property of the taxpayer which was subject to levy; or (2) that the property was subject to a prior judicial attachment or execution. The statute admits of no other defenses.[4]

---

[3] See also United States v Scovil, 1955, 348 U.S. 218, 220.

In the instant case, of course, judicial attachment or execution does not figure. The appellant does maintain, however, that it did not have in its possession "property rights [sic] to property subject to levy" at the time of demand or levy by the District Director of Internal Revenue on June 10, 1955.

This is based upon the further contention that the appellant had a "right of set off" bottomed upon the agreement of August 31, 1954, and "the demand note" of April 16, 1955, *supra*. It is argued that by virtue of the agreement of August 31, 1954, which "prior to the assessment of taxes against the taxpayer on November 15, 1954 [*supra*], or the recording of the notice of tax lien on January 12, 1955 [*supra*]," the appellant has acquired "a right of set off by contract which was paramount to the subsequent tax lien." Finally, it is urged that "there existed no balance in the depositor-taxpayer's account which was subject to levy by the District Director of Internal Revenue".

We do not agree. The appellant could not protect itself from a Federal tax levy by the taxpayer's inchoate agreement, or by an asserted right of setoff arising from a debt that was not in existence at the time the tax liens arose, *supra*. The liens came into being at the time the assessments were made. See §6322, *supra.*

---

[4] See United States v Manufacturers Trust Co., 2 Cir., 1952, 198 F.2d 366, 369; United States v Third Nat. Bank & Trust Co., DC Pa., 1953, 111 F.Supp. 152, 156.

In United States v Graham, DC Cal., 1951, 96 F. Supp. 318, 321, affirmed *per curiam sub nom.* State of California v United States, 9 Cir., 1952, 195 F.2d 530, certiorari denied, 1952, 344 U.S. 831, the District Judge said:

> "The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months *before* the leases with the State of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state *accrued with a lien impressed upon it. There was no period of time in which the State of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien.* In U.S. v Winnett, supra, the right of set-off accrued *before* any tax liens arose. . . .
>
> * * *
>
> "Assuming arguendo that the State of California may assert an equitable set-off against a delinquent taxpayer, the set-off could have been asserted *no earlier than the time at which the lease agreements were entered into with the taxpayer. No set-off could arise until such time as there existed something to be set-off against.* But the rights of the taxpayer under the lease were born with the *tax lien impressed thereon.*
>
> "Assuming further that the set-off and the tax liens attached simultaneously to the interest of the taxpayer created by the lease agreements, no

> citation of authority is needed to establish that *the federal tax lien is superior to any simultaneously attaching interest of the State of California.* Therefore the rights of the State of California, with respect to the money accrued as rentals under the leases made with the taxpayer are inferior to the tax liens of the United States." [Emphasis supplied.]

It should be noted here that this Court affirmed the District Court's judgment in the *Graham* case, *supra,* "On the ground and for the reasons stated" in the District Judge's opinion. We adhere to the teaching of *Graham.*

"The first in time is the first in right" was declared to be the determining principle by Mr. Justice Minton, in United States v. New Britain, 1954, 347 U.S. 81, 85-86.

In that case, the Court quoted the following language of Mr. Chief Justice Marshall in Rankin & Schatzell v. Scott, 25 U.S. 177, 179:

> "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

In its opinion in the *New Britain* case, *supra,* the Supreme Court continued:

> "This principle is widely accepted and applied, in the absence of legislation to the contrary. 33

> Am. Jur., Liens, §33; 53 C.J.S., Liens, §10b. We think that Congress had this cardinal rule in mind when it enacted §3670 [the predecessor of §6321, *supra*], a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became *CHOATE*." [Emphasis supplied.]

An examination of the lengthy paragraph quoted *supra* from the financial statements of August 31, 1954, February 28, 1955, and May 31, 1955 will convince even the casual reader of the record that whatever lien the appellant had upon the taxpayer's deposit on those dates was *INCHOATE* in the extreme!

The doctrine of "relation back" cannot avail the appellant here. In the *Security Trust* case, *supra*, 340 U.S. at pages 50-51, the Court used language quite apposite here:

> "Nor can the doctrine of relation back--which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment--operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere "*caveat* of a more perfect lien to come. . . .
>
> * * *
>
> ". . . Accordingly, we hold that the tax liens of the United States are superior to the *INCHOATE* attachment lien of Morrison, . . ." [Emphasis supplied.]

Finally, the Court in United States v. Kings County Iron Works, 2 Cir., 1955, 224 F.2d 232, 237, tersely summarized the rule that is applicable here:

> "The mere attachment of the government's [tax] lien gives it a fully perfected claim superior to all except mortgagees, pledgees, purchasers, or judgment creditors of the taxpayer."

No amount of legalistic sophistry can erode the Gibraltar of that rule.

6. *The Appellant's Inchoate Right of Setoff Cannot Override the Appellee's Choate Tax Levy*

The appellant insists that there is a "general" rule that "a bank has a general lien upon or right of set off against all monies or funds in its possession belonging to a depositor to secure the payment of a depositor's indebtedness to it". It specifies as error the District Court's "finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of set off on the part of the [appellant]".

The record does not show that the taxpayer was indebted to the appellant at the time the agreement of August 31, 1954 was executed. The record does show, however, that the debt which the appellant is attempting to set off did not arise until April 16, 1955, *after* the tax liens of November 15, 1954, and March 1, 1955 came into existence. These two latter dates are the assessment dates, and, as we have seen, under §6322 "Unless another date is specifically fixed by aw, the lien imposed by section 6321 shall arise at the ime the assessment is made".

We have also seen that the identical agreements f August 31, 1954, February 28, 1955, and May 31, 955, specified the following contingencies that would ive rise to the appellant's right to exercise its option f set off.

(a) If the taxpayer failed in business or became nsolvent;

(b) If the taxpayer's deposit account or any other roperty of the taxpayer held by the appellant was he subject of an attempt to be obtained or held by rit of execution, garnishment, attachment or other egal process;

(c) If the taxpayer failed to notify the appellant f any material change in the taxpayer's financial conition; and

(d) If any of the taxpayer's representations roved to be untrue.

It is clear that the only fact which gave the appelant the option to set off was the appellee's demand and levy; but that demand and that levy admittedly took place *prior* to the alleged exercise of the appellant's option.

Under the present facts and under the authorities already referred to, the appellant cannot avail itself of finespun "general" theories dealing with a bank's "general" lien or "right" of setoff. The Federal tax collector is not to be frustrated in this way.

7. *In the Absence of a Demand, the Taxpayer's Note Was Not Intended To Be Payable Until August 14, 1955*

So far we have assumed that the taxpayer's note was a true demand note, due and payable on the date of its face, April 16, 1955. The due date specified in the instrument itself, however, read as follows:

> "On Demand; if no demand is made then on August 14th, 1955. . . ."

No demand was made by the appellant; but, as we have seen, on June 10, 1955, the appellant's officer announced, *after* the notice of levy was received by the bank, that the bank had exercised its right of setoff, etc.

In the absence of demand, a note of the type that we are here considering falls due on the alternative date specified.

In Sullivan v Ellis, 8 Cir., 1915, 219 F. 694, 696, the Court said:

> "The general rule with regard to commercial paper, payable on demand, is that it becomes due immediately, and that the statute of limitations begins to run from its date.
>
> " 'This rule may not apply where there is something on the paper, or in the circumstances under which it is given, showing that it was not the intention that it should become due immediately.' 7 Cyc. 848, 849."

In 10 C.J.S. §247b, page 744, we find the rule correctly stated:

> "* * *
>
> "Although the maker of a demand note is not in default until he refuses payment until after demand therefor, it is generally held that a note payable on demand is due immediately, so that suit may be maintained on it at any time after delivery without any other demand than the suit. *This rule may not apply, however, when there is something on the paper,* or in the circumstances under which it was given, to show that it was not the intention that it should become due immediately, . . ." [Emphasis supplied]

In the instant case, there assuredly was "something on the paper . . . to show that it was not the intention that it should become due immediately", in the absence of a demand. No demand was made.

But even if we assume, for the sake of the argument, that the commercial paper was a true demand note and therefore became due on the date of its execution and delivery—April 16, 1955—even at *that* early date, the appellee's tax liens had already attached. We have seen that on January 12, 1955, a notice of tax lien pertaining to the November 15, 1954, assessment of withholding and insurance contributions taxes was filed with the County Recorder; and on March 1, 1955, certain excise taxes for 1954 were assessed against the taxpayer, who, after notice and demand, had refused to make payment.

Accordingly, according to whatever theory we consider the appellant's rights under the taxpayer's note of April 16, 1955, those rights are *junior* to the appellee's tax liens.

Furthermore, regardless of dates, the mere fact that the note might be due does not mean that an equitable right of setoff necessarily exists.

In American Surety Co. v City of Akron, 6 Cir., 1938, 95 F.2d 966, 970, the Court noted the subordinate position of setoff:

> "However, this right of equitable set-off is not absolute or paramount to the superior equities of other claimants. [Case cited.] Cf. Gray v School District, 3 Cir., 67 F.2d 141, 143, which pointed out that the right of equitable set-off could be enforced only where no equity of third persons will be injured."

In the instant case, we are not even faced with the problem of balancing equities. We are asked to balance an inapplicable equitable principle against the plain mandate of a tax statute. "Equity follows the law."

The appellant relies heavily upon our decision in United States v Winnett, 9 Cir., 1947, 165 F.2d 149. That case, however, is readily distinguishable on the facts. There, *before* the tax liens attached, Winnett endorsed the taxpayer's notes, with the understanding, both oral and written, that in the event the taxpayer defaulted in any or all of the payments, and Winnett was called upon to make good, the amount so paid by Winnett could be set off against any amounts due or to become due on a note previously executed by Winnett in favor of the taxpayer Summers.

Furthermore, also *before* the tax liens attached, the taxpayer became insolvent. Here, of course, no insolvency is involved.

That the taxpayer's *insolvency* was the primary, though not the sole, basis for this Court's holding that the tax lien "was enforceable against Winnett only as to the unpaid balance of the $60,000 note after deducting the amount of the claimed off-sets", is evident from the following language of the *Winnett* opinion:

> "Because of the insolvency of Summers [the taxpayer] on January 1, 1939, the equitable right of set-off accrued to Winnett on that date, under the laws of the state of California notwithstanding his claim was then based upon a contingent obligation; furthermore, his equitable right to set-off related back to the date of agreement for set-off, which was prior to the lien of the United States."

The appellant also relies upon *Winnett* for the proposition "that the rights of the [appellee] do not extend beyond those of the taxpayer whose right to property is sought to be levied upon". If we assume this proposition to be correct, it should be pointed out that on the dates of levy and demand or of recordation—November 16, 1954, January 12, 1955, and March 1, 1955, and June 10, 1955,—the taxpayer had full right to use his bank account, and, indeed, did continue to use it thereafter.

It will be observed that in the above excerpt from Winnett, our Court stated that Winnett's "equitable right to set-off related back to the date of agreement for set-off, which was prior to the lien of the United States". The Supreme Court of the United States, however, in the *Security Trust* case, supra, which was decided nearly three years after *Winnett,* frowned, as we have seen, upon the doctrine of "relation back"—at least when that doctrine was invoked to frustrate the sovereign in the collection of its fisc.

Finally, in the *Winnett* case, this Court observed that Winnett "should not be required to pay the same debt twice even though the interposition here is by the sovereign". In the instant case, at least, the appellant is in no danger. As Chief Judge Parker well observed in United States v Eiland, 4 Cir., 1955, 223 F.2d 118, 121-122:

> ". . . payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt. [Cases cited.]"

8. *Conclusion*

No strained theories of setoff, relation back, or the like can frustrate the sovereign from collecting its taxes in this case. The stubborn principle remains, under the facts of this case, that the appellant is liable for failing to surrender, after levy and demand, the bank account to which the liens had attached.

Accordingly, the judgment is

Affirmed.

(Endorsed:) Opinion. Filed Dec. 31, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Bank of Nevada, Appellant, vs. United States of America, Appellee.	No. 15,541

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: December 31, 1957

Paul P. O'Brien, Clerk

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statute involved 2

Statement 2

Argument 6

Conclusion 14

Appendix 15

CITATIONS

Cases:

American Surety Co. v. *City of Akron*, 95 F. 2d 966 11

Commonwealth Bank v. *United States*, 115 F. 2d 327 8

Glass City Bank v. *United States*, 326 U. S. 265 7

Nelson v. *Commissioner*, 101 F. 2d 568 13

United States v. *Acri*, 348 U. S. 211 10

United States v. *Bank of Shelby*, 68 F. 2d 538 9, 11, 12

United States v. *Eiland*, 223 F. 2d 118 7, 13

United States v. *Gilbert Associates, Inc.*, 345 U. S. 361 13

United States v. *Graham*, 96 F. Supp. 318, affirmed, *per curiam, sub nom. State of California* v. *United States*, 195 F. 2d 530, certiorari denied, 344 U. S. 831 9

United States v. *Liverpool & London, Ins. Co.*, 348 U. S. 215 7, 10

United States v. *Manufacturers Trust Co.*, 198 F. 2d 366 7, 8, 13

United States v. *New Britain*, 347 U. S. 81 9, 10

United States v. *R. F. Ball Construction Co.*, 355 U.S. 587 11

United States v. *Security Tr. & Sav. Bk.*, 340 U. S. 47 10, 11

Statutes:	Page
Internal Revenue Code of 1954:	
Sec. 6321	2, 6, 8, 15
Sec. 6322	2, 6, 8, 15
Sec. 6323(a)	2, 13, 15
Sec. 6331(a)	2, 6, 8, 16
Sec. 6331(b)	2, 6, 16
Sec. 6332(a)	2, 6, 8, 16
Sec. 6332(b)	2, 7, 8, 12, 16
Miscellaneous:	
Rev. Rul. 57-367, 1957-32 Int. Rev. Bull. 22	13-14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 852

BANK OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court (R. 8-18[1]) are reported at 155 F. Supp. 164. The opinion of the Court of Appeals (R. 19-38) is reported at 215 F. 2d 820.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1957. (R. 39.) The petition for a writ of certiorari was filed March 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

---

[1] "R" references are to Appendix B to the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the courts below were correct in concluding that federal tax liens against a delinquent taxpayer's bank account, arising under Sections 6321 and 6322 of the Internal Revenue Code of 1954, were paramount to an alleged right of set-off asserted by the bank, and that the bank therefore was in possession of property subject to a levy and was liable under Section 6332 for its failure to surrender such property.

STATUTE INVOLVED

The pertinent provisions of Sections 6321, 6322, 6323(a), 6331(a) and (b), and 6332(a) and (b) are printed in the Appendix, *infra*, pp. 15-17.

STATEMENT

The facts, which were entirely stipulated (R. 20, 23), were summarized by the Court of Appeals (R. 20-23) as follows:

On November 15, 1954, certain withholding and federal insurance contributions act taxes for the calendar year 1954 in the amount of $804.50 were assessed against J. D. Bentley of Las Vegas, Nevada (hereinafter referred to as the taxpayer). On the following day, the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so. (R. 20.)

On January 12, 1955, a notice of tax lien pertaining to this assessment was filed with the County Recorder of Clark County, Nevada. (R. 20.)

On February 28, 1955, and on August 31, 1954, the taxpayer ~~submitted financial~~ statements to the Bank of Nevada (hereinafter referred to as the bank). Each statement read in part as follows (R. 20-21):

> The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then and in such case, *at your option*, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a con-

> tinuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary. [Emphasis supplied.]

On March 1, 1955, certain federal excise taxes for the calendar year 1954 amounting to $187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment. Demand was made upon him to pay it, but he has refused to do so. (R. 21.)

On April 16, 1955, the taxpayer and his wife, Doris L. Bentley, borrowed $2,000 from the bank and executed a promissory note in favor of the bank for that amount. (R. 21.)

On May 31, 1955, the taxpayer submitted to the bank another financial statement, containing the same provision relating to the bank's right of set-off that has been quoted above. (R. 21-22.)

On June 10, 1955, the taxpayer had on deposit in an account with the bank the sum of not less than $878.16. At 1:45 p.m. on that day, the United States, through one of its collection officers, served a "Notice of Levy" upon the bank by delivering it to E. K. Phillips, the assistant cashier. This Notice of Levy covered both of the assessments referred to above. (R. 22.)

On that same day, A. M. Smith, vice president and manager of the bank's First and Fremont Branch, wrote to the collection officer as follows (R. 22):

> This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.
>
> I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy.

The "unsecured indebtedness" referred to in the above letter was the balance of the note for $2,000, referred to above, which balance, at the time of the levy, amounted to approximately $1,500. The bank exercised its "claimed" right of setoff subsequent to 1:45 p.m. on June 10, 1955, the precise time at which the collection officer delivered the Notice of Levy to the bank's assistant cashier. The bank conceded that it exercised its right of setoff "thereafter." (R. 22.)

On June 13, 1955, a notice of federal tax lien pertaining to the assessment of federal excise taxes was filed in the office of the County Recorder of Clark County, Nevada. (R. 23.)

On June 14, 1955, the collection officer served a final demand upon the bank's vice president and manager of its First and Fremont Branch. (R. 23.)

On September 28, 1955, the United States filed suit in the court below to recover from the bank the sum of $878.16, with interest and costs. That sum represented the amount which the taxpayer had on deposit with the bank on June 10, 1955. (R. 23.)

The District Court held that the federal tax liens were paramount and valid liens, and that the United States was entitled to judgment as prayed for. (R.

23.) The Court of Appeals unanimously affirmed (R. 39).

ARGUMENT

Section 6321 of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 15) provides that, if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Section 6322 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 15-16) provides that this lien is deemed to arise at the time the assessment is made and continues until the liability for the amount assessed is satisfied.

If the person who is liable to pay the tax neglects or refuses to do so within ten days after notice and demand is made upon him, the Secretary of the Treasury, or his delegate, may collect such tax by levy upon all property and rights to property (with certain exceptions not pertinent here) belonging to such person or on which there is a lien. Section 6331 of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 16). Upon such a levy, any person who is in possession of property or rights to property which are subject to the levy shall, upon demand, surrender such property or rights to the Secretary or his delegate, unless the property is, at the time of demand, subject to an attachment or execution under any judicial process. Section 6332(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 16-17). Any person who, upon demand, fails or refuses to surrender property or rights to property which is subject to levy is liable in his own person or estate to the United States in a sum equal to the value of the property not surrendered (not to exceed the amount of the taxes for the collection of which the levy has been made, together with costs and statutory interest from the date of the levy). Section 6332(b) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 17).

It is clear from the stipulated facts in this case that the bank was in possession of property belonging to a delinquent taxpayer.[2] A federal tax lien had attached to this property and it was subject to levy. Demand was properly made upon the bank and it refused to surrender the property. The bank, pursuant to Section 6332(b) of the 1954 Code, accordingly became personally liable to the United States for its failure to surrender such property, and the courts below (R. 18, 39) were correct in so holding.

Specifically, on November 15, 1954, taxes in the amount of $804.50 were assessed against the taxpayer; the taxpayer was notified of this assessment, demand was made upon him, and he has neglected or refused to pay the assessed amount. (R. 20.) Similarly, on March 1, 1955, additional taxes in the amount of $187.51 were assessed against the taxpayer; the taxpayer was notified of this assessment, demand was made upon him, and he has neglected or refused to pay the assessed amount. (R. 21.) Pursuant to Sections 6321 and 6322 of the 1954 Code, federal tax liens, in the amounts of $804.50 and $187.51, arose on November 15, 1954, and March 1, 1955, respectively, and attached to all property or rights to property belonging to the taxpayer; these liens were to continue until the liability for the assessed amount was satisfied.

---

[2] It is well-established, and undisputed, that the word "property", as used in the statutory provisions involved herein, is to be construed broadly and includes obligations, debts owing to the taxpayer and other intangibles. A bank account, being a debt of the bank to the depositor, is thus "property or rights to property" against which a lien may attach and a levy may be made. *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Eiland*, 223 F. 2d 118 (C.A. 4th); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C. A. 2d). See also *Glass City Bank* v. *United States*, 326 U. S. 265.

On June 10, 1955, the taxpayer owned property, in the form of a checking account with the bank, in the amount of not less than $878.16. (R. 22.) On this date, the District Director, pursuant to Section 6331(a) of the 1954 Code, levied upon, and demanded the surrender of, the checking account of the bank. (R. 22.) The bank was required by Section 6332(a) to surrender this amount, but it refused to do so. (R. 22-23.) Accordingly, under Section 6332(b), the bank became liable in its own person and estate in the sum equal to the amount of the account ($878.16), together with costs and statutory interest from the date of the levy.

As the Court of Appeals correctly held (R. 27-28), Section 6332(a) permits the bank only two defenses: (1) that it was not in possession of property of the taxpayer which was subject to levy; (2) that the property was subject to a prior judicial attachment or execution. *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2); *Commonwealth Bank* v.

United States, 115 F. 2d 327 (C. A. 6th). Here, there is no question of a judicial attachment or execution by the bank or anyone else. And, as the court below held (R. 28), the bank was in possession of property of the taxpayer at the time of the levy.

The bank, however, asserts (Pet. 3, 5) that the loan, which was made by the bank to the taxpayer on April 16, 1955 (R. 21), gave rise to a right of set-off, which was inseparable from the debt to the bank, in that both arose out of the same transaction. The bank then asserts that the right of set-off was exercised at the moment the levy was served. The bank thus apparently contends that, at the time of the levy (June 10, 1955), it was not in possession of property belonging to the taxpayer which was subject to the levy. In this connection, the bank cites *United States* v. *Bank of Shelby*, 68 F. 2d 538 (C. A. 5th), which it contends (Pet. 6-7) is in conflict with the decision in this case.

The Court of Appeals, however, correctly rejected the bank's defense (R. 32-33). Most important, the court noted (R. 32) that the tax liens were in existence, and had attached, at the time the loan to the taxpayer was made. Accordingly, as the court below held (R. 28-29), whatever rights the bank obtained as a result of this loan were born with the tax lien impressed thereon. *United States* v. *Graham*, 96 F. Supp. 318, 321 (S.D. Cal.), affirmed *per curiam sub nom. State of California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831. It is axiomatic that the first in time is the first in right. *United States* v. *New Britain*, 347 U. S. 81, 85-86.

The only semblance of a right of set-off in this case was the contractual right arising from the filing of the financial statements by taxpayer on August 31, 1954, February 28, 1955, and May 31, 1955. (R. 20-21, 21-22.) On the dates the tax liens attached and, indeed, at the time of the levy, this right was, as the court below phrased it (R. 31), "inchoate in the extreme." *United States* v. *New Britain*, *supra; United States* v. *Acri*, 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co.*, *supra; United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47. The right would not arise until (1) a loan had been made, (2) one of a number of contingencies occurred,[3] and (3) the bank exercised its option to set-off. (R. 20-21.) By the time this contractual right could even be considered to have become choate (subsequent to 1:45 p.m. on June 10, 1955), the tax liens had attached *and* the levy had been made.[4] As the court below held (R.

---

[3] *I.e.:* (a) if the taxpayer failed in business or became insolvent; (b) if the taxpayer's deposit account or any other property of the taxpayer held by the bank was the subject of an attempt to be obtained or held by writ of execution, garnishment, attachment, or other legal process; (c) if the taxpayer failed to notify the bank of any material change in the taxpayer's financial condition; or (d) if any of the taxpayer's representations proved to be untrue. (R. 33.)

[4] Indeed, it does not even appear that the bank actually attempted to exercise its option to set-off. Although the bank stated in a letter to the collection officer (R. 22) that it was exercising its option to set-off, the bank records show that it did not, in fact, set-off the amount in the taxpayer's bank account against the debt owed the bank. Instead, the bank honored taxpayer's withdrawals on the date of the set-off and charged taxpayer's account only with the amount of the Director's levy, not the amount of the remaining bal-

27-33), the bank could not shield the taxpayer's account by an inchoate agreement with the taxpayer and the bank's inchoate right of set-off cannot override the choate federal tax lien. *United States* v. *Security Tr. & Sav. Bk., supra; United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587.[5]

The decision of the Fifth Circuit in *United States* v. *Bank of Shelby*, 68 F. 2d 538, is not in conflict with the decision in this case. Contrary to the bank's

---

ance in the account ($209.71, plus a $20 deposit which was accepted) or the amount of the debt owing to the bank at the time of the levy ($1,500). The bank continued to honor withdrawals and accept deposits thereafter and it does not appear that it ever set-off the full amount of the debt. (See Transcript of Record filed in the Court of Appeals, pp. 26-27.)

[5] The bank (Pet. 9-10) apparently has abandoned its contention that the contractual right of set-off related back to the date of the first financial statement (August 31, 1954), which was prior to the dates the tax liens arose. Such contention was wholly without merit. The doctrine of relation-back cannot be used to defeat a federal tax lien. *United States* v. *Security Tr. & Sav. Bk., supra.*

Similarly, the bank has apparently abandoned its contention that the note was a demand note and that an equitable right of set-off arose upon execution thereof. Both courts below found (R. 11-12, 34-35) that the note was not, in fact, a demand note. Indeed, as the Court of Appeals noted (R. 35), even if the note was a demand note, the tax liens had already attached on the date of the execution of the note and, furthermore, an equitable right of set-off arises with respect to a demand note only upon the insolvency of the maker, upon his refusal to pay, or where the creditor has no practical legal remedy. *American Surety Co.* v. *City of Akron*, 95 F. 2d 966 (C. A. 6th). Such was not the case here.

contention (Pet. 7), the *Bank of Shelby* decision is not based solely upon the fact that the obligations between the bank and the delinquent taxpayer arose out of the same transaction. The Fifth Circuit first noted that the statute establishing liability upon the bank for refusing to honor a levy (a predecessor to Section 6332 of the 1954 Code) was not even in effect on the date of the first levy in that case. The court also based its decision on the fact that, even though further levies were made upon the bank after the effective date of the statute, the depositor-taxpayer was insolvent prior to the first levy. The court held (p. 539) that the insolvency of the debtor created an equitable right of set-off and that no property of the taxpayer existed on the date of the levy. Here, there is no question of insolvency. The two cases are thus clearly distinguishable.

The bank further contends (Pet. 5) that the balance in the delinquent taxpayer's account was not his money, but the bank's, and that the taxpayer only had a (Pet. 9) "revocable license" to use the credit balance in his account. The bank then asserts (Pet. 9) that the United States' rights rise no higher than those of the taxpayer. However, even assuming *arguendo* that the Government could reach nothing that the taxpayer could not reach, it is clear that the taxpayer had full and unrestricted use of the account, prior and subsequent to the levy. On the very day of the levy, taxpayer withdrew and deposited various amounts, and he has continued to do so. As noted above (see fn. 4, *supra*), it does not appear that the bank has ever set-off the full amount of the debt.

Finally, the bank implies (Pet. 4, 8) that it should be entitled to actual notice of the federal tax liens.[6] In this connection, the bank also asserts (Pet. 7-8) that the decision in this case will have a great impact on banking transactions. The plain answer to these contentions is that the applicable statutory provisions clearly set forth the priority of tax liens, as well as the broad remedy of levy as a device to enforce the collection of taxes. See *United States* v. *Eiland*, *supra*, pp. 121-122; *United States* v. *Manufacturers Trust Co.*, *supra*, p. 368. The personal liability of the bank for failure to surrender the property levied upon is clear. There is nothing in the plain language of the statute, or in the decisions, to indicate that banks are entitled to actual notice or are to be accorded any preferred treatment as compared with other types of creditors.[7]

---

[6] The first lien was recorded prior to the date of the bank's loan to the taxpayer and the second lien was recorded after the levy upon the bank. (R. 20, 23.)

[7] The only persons entitled to even *constructive* notice, under the statute, are mortgagees, pledgees, purchasers, or judgment creditors. See Section 6323(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 15-16). Taxpayer asserts (Pet. 10) that, insofar as the Government contended that the claimed right of set-off is tantamount to a claimed prior lien, it would be entitled to constructive notice as a pledgee. However, Congress used the words in Section 6323 in the usual, conventional sense (see *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364), and a bank is not a pledgee with respect to the accounts of its depositors. See *Nelson* v. *Commissioner*, 101 F.2d 568, 571 (C. A. 8th). Furthermore, the first tax lien, at least, was recorded prior to the date of the loan. (See fn. 6, *supra*.)

In this connection, the bank also cites Rev. Rul. 57-367,

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.

Charles K. Rice,
Assistant Attorney General.

A. F. Prescott,
Sheldon I. Fink,
Attorneys.

APRIL 1958

1957-32 Int. Rev. Bull. 22. (Pet. 4.) That ruling merely holds that, if a bank does not have actual notice of a tax lien, the bank will not incur liability to the Government if it makes payments to a depositor. However, if, as here, the bank receives actual notice, the ruling provides that the bank may protect itself by withholding payment of the sum in question. In the instant case, the bank did not comply with this ruling.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

> (1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has

by law designated an office within the State or Territory for the filing of such notice; or

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6323.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary of his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interests on such sum at the rate of 6 percent per annum from the date of such levy.

* * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 6322.)

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 481202 1298